88 - 1689

Docket No.

FILED
APR 18 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1983

KAY J. BROWN, Administratrix of the
Estate of Edward Carol Brown, deceased,
KAY J. BROWN, Individually,
RONNIE EDWARD BROWN, an infant by his
Guardian ad litem, Wiley G. Gary, and
TIMOTHY EARL HOGGARD,
Petitioners,

v.

PATRICIA ANN BROWN
and
ALLIED TOWING CORPORATION,
Respondents.

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

Alan P. Owens
SMITH & OWENS
250 Monticello Arcade
Post Office Box 3646
Norfolk, Virginia 23514
(804) 622-1621

Counsel for Petitioner

INDEX TO APPENDIX

A. Opinion and Order of the Supreme Court of Virginia 226 VA.. . . . . A1-A25

B. Order of the Supreme Court of Virginia Denying Petition for Rehearing. B-1

C. Order Staying Execution of Judgment. C1-C2

D. Letter Opinion of the Circuit Court of the City of Norfolk dated October 31, 1980. . . . . D1-D27

E. Order of Circuit Court of City of Norfolk Incorporating Letter Opinion and Ordering Distribution. . . . E1-E6

F. Administratrix's Motion for Judgment filed in the Circuit Court of the City of Norfolk, November 24, 1976. . . . . F1-F7

G. Order dated March 10, 1980 Entered by the Honorable Richard B. Kellam, U.S. District Court for the Eastern District of Virginia, Civil Action No. 77-124-N Allowing Administratrix to Prosecute State Court Action where he may have a Jury Trial. G1-G8

H. Opinion - United States v. Allied Towing Corp. (4th Cir. 1979) 602 F.2d 612. . . . . H1-H22

I. Opinion - Allied Towing Corp. v. Tatem (4th Cir. 1978) 580 F.2d 702. . . . . I1-I12

J. Opinion - Complaint of Allied Towing Corp. (D.C.E.D.Va. 1976) 416 F.Supp 1207. . . . . J1-J16

K. Opinion - Complaint of Allied Towing Corp. (D.C.E.D.Va. 1976) 409 F.Supp 180. . . . . K1-K46

L. 33 U.S.C. Sections 905 & 933, Longshoremen's and Harbor Workers' Compensation Act. L1-L9

M. Section 8.01-50 et seq. Virginia Code, Death by Wrongful Act. M1-M6

APPENDIX A

IN THE SUPREME COURT OF VIRGINIA

Present: All the Justices

OPINION BY CHIEF JUSTICE HARRY L. CARRICO
December 2, 1983

PATRICIA ANN BROWN

v. Record No. 810525

KAY J. BROWN, ADMINISTRATRIX, ETC. ET AL.

FROM THE CIRCUIT COURT
OF THE CITY OF NORFOLK
John W. Winston, Judge

This appeal involves the death of a shipyard worker on the navigable waters of the Commonwealth and presents a choice-of-law question with respect to the distribution of a fund paid in settlement of a wrongful death claim. Finding that the trial court erred in applying admiralty law to include the unadopted stepson of the decedent among the distributee of the fund, we reverse.

Edward Carol Brown (Brown) was killed on March 17, 1975, when a tank barge owned by Allied Towing Corporation (Allied) exploded and burned as it law alongside Allied's dock on the Elizabeth River in Norfolk. Brown, a shipyard employee of Allied, was engaged in repairing the barge when it exploded.

On April 10, 1975, pursuant to 46 U.S.C. Sections 181, et seq., Allied filed in the United States District Court for the Eastern District of Virginia a petition seeking the maritime remedy of exoneration from, or limitation of, liability in connection with the explosion and fire. Kay J. Brown, the widow of Brown and the administratrix of his estate (Kay), filed in the limitation proceeding a claim for his death, and she and other

claimants were enjoined from prosecuting claims except in that proceeding.

On March 9, 1976, the District Court denied Allied's petition, Complaint of Allied Towing Corp., 409 F.Supp. 180 (E.D. Va. 1976), and, on August 2, 1976, dissolved the restraining order, thus permitting the claimants to proceed in the forum of their choice, Complaint of Allied Towing Corp., 416 F.Supp. 1207 (E.D. Va. 1976). These actions of the District Court were subsequently affirmed on appeal. Allied Towing Corp. v. Tatem, 580 F.2d 702 (4th Cir. 1978).

On November 24, 1976, Kay filed in the Circuit Court of the City of Norfolk a motion for judgment against Allied seeking $1,800,000 in damages and alleging that Brown "met his death as a

direct and proximate result of [Allied's] negligence." The motion also alleged that "[t]his Claim is governed by the General Maritime Law of the United States."

On February 11, 1977, believing that a jury was permitted in a federal court admiralty action, Kay filed in United States District Court a civil action for Brown's death. When that court denied her request for a jury trial, Kay sought and obtained leave to dismiss her federal action "to enable [her] to prosecute her claim in the State Court where she may have trial by jury."

Kay returned to the Circuit Court of the City of Norfolk to prosecute the action pending there. the case went to trial before a jury on June 18, 1980, but during the trial, the parties

settled the matter. Pursuant to the terms of the settlement, Allied paid the sum of $400,000 into court for distribution among those found entitled to share in the fund.

Thereafter, the trial court conducted a hearing to determine the distribution of approximately $265,000 remaining in the fund after payment of counsel fees and costs. The evidence at the hearing showed that, in addition to Kay, Brown was survived by their son, Ronnie, born December 15, 1968, and Brown's daughter by a previous marriage, Patricia, born July 9, 1962. Kay also had a child by a previous marriage, Timothy Hoggard, born December 4, 1964. Timothy's natural father died in 1965, and Timothy had lived with his mother and stepfather ever since their marriage in 1966. Yet, although Brown partially

supported Timothy and treated him as his own son, he never adopted the boy.

Brown and his first wife were divorced when Patricia was four years old. The mother was granted custody, and Brown was ordered to pay $7.50 per week for child support. Brown terminated these payments sometime in 1967 because he could not afford to continue them; apparently, no effort was made thereafter to enforce the payments. Patricia, who lived in North Carolina, saw her father approximately twice a year and occasionally talked with him on the telephone.

After the hearing, the trial court held in a written opinion that admiralty law applied and that, as a result, Timothy was entitled to participate in the distribution of the net proceeds of the fund. Using a formula taking into

account several factors, the court apportioned $173,510.75 to Kay, $53,000 to Ronnie, $31,340 to Timothy, and $7,000 to Patricia. From the final order directing distribution in this manner, Patricia has appealed.

Patricia contends that the trial court erred in applying admiralty law and distributing a portion of the fund to Timothy. She argues that, despite the allegation in Kay's motion for judgment stating "[t]his Claim is governed by the General Maritime Law," the cause of action asserted by Kay is essentially one under Virginia's Death by Wrongful Act statute, Code Sections 8.01-50 to 56, and the distributees of the fund should be determined by resort to Section 8.01-53. Under this section as it read at the time Brown was killed, damages awarded for a wrongful death

were distributed to "the surviving spouse, children, and grandchildren of the deceased."[1] Patricia maintains that, although Virginia has not decided the point, the states which have considered the question are unanimous in holding that the term "children," as used in wrongful death statutes similar to Virginia's, does not include unadopted stepchildren.

Kay, Ronnie, and Timothy (collectively, Kay) contend, on the other hand, that the trial court

---

[1] A 1979 amendment changed this language to "the surviving spouse, children of the deceased and children of any deceased child of the deceased." Acts 1979, ch. 356.

properly applied admiralty law and correctly held Timothy was entitled to share in the distribution of the fund. Kay submits that, pursuant to the maritime decision in Petition of United States, 418 F.2d 264 (1st Cir. 1969), a dependent stepchild, although unadopted, is entitled to share in an award for a stepparent's wrongful death.

Kay insists that "[i]t is beyond question that federal substantive law...grants both the remedy and identifies the beneficiaries in a maritime wrongful death claim." Quoting Jansson v. Swedish American Line, 185 F.2d 212, 216 (1st Cir. 1950), Kay states that when an action is brought in a state court upon a claim cognizable in admiralty, "the substantive law to be applied is the same as would be applied by an admiralty court--that is, the

general maritime law, as developed and declared...by the Supreme Court of the United States." And, Kay points out that the Supreme Court, in Moragne v. States Marine Lines, 398 U.S. 375 (1970), said that a state trial court is "bound to apply federal maritime law in a case within federal admiralty jurisdiction." Id. at 378 n.1.

The determinative question becomes, therefore, whether the cause of action asserted by Kay is "a case within federal admiralty jurisdiction." Alleging in a pleading, as Kay alleged here, that a case "is governed by the General Maritime Law" does not necessarily make a cause of action one "within federal admiralty jurisdiction." Admiralty law itself determines what cases come within admiralty jurisdiction. We believe that the

question in this appeal is answered by the Supreme Court's maritime decision in Moragne.

The trial court cited Moragne as support for its holding that admiralty law applied and required inclusion of Timothy as a distributee of the fund; Kay relies heavily upon the case here. Moragne involved a longshoreman who was killed while working aboard a vessel on navigable waters within the state of Florida. His personal representative brought an action in a Florida state court against States Marine Lines, the vessel's owner, alleging both negligence and unseaworthiness as bases for recovery of damages.

States Marine removed the case to federal court on the ground of diversity of citizenship. In District Court, States Marine moved to dismiss the

portion of the claim based upon unseaworthiness, asserting that maritime law provided no remedy for wrongful death within a state's territorial waters and that Florida's wrongful death statute did not encompass unseaworthiness as a basis of liability. The District Court dismissed the challenged portion of the complaint, and the personal representative appealed the dismissal to the Court of Appeals for the Fifth Circuit.

Taking advantage of a Florida statute, the Court of Appeals certified to the Florida Supreme Court the question whether that state's wrongful death statute "allowed recovery for unseaworthiness as that concept is understood in maritime law." 398 U.S. at 377. The Florida court answered the question in the negative. When the case

returned to the Court of Appeals, that court affirmed the District Court's order, thus "rejecting [the personal representative's] argument that she was entitled to reversal under federal maritime law without regard to the scope of the state statute." Id.

When the case reached the Supreme Court, the Court stated that it had granted certiorari "to consider whether The Harrisburg, 119 U.S. 199, in which [the] Court held in 1886 that maritime law does not afford a cause of action for wrongful death, should any longer be regarded as acceptable law." 398 U.S. at 375-76. The Court reversed, holding that "an action does lie under general maritime law for death caused by violation of maritime duties." Id. at 409. In taking this action, the Court overruled The Harrisburg. The Court

explained that, in previously denying recovery for wrongful death, admiralty merely followed the common law rule that "no civil action lies for an injury which results in ... death,'" 398 U.S. at 380; this ancient rule was based upon the precept that "a personal cause of action in tort did not survive the death of its possessor." Id. at 385.

The Court noted that, over the years, the common law rule had been abandoned. This abandonment was exemplified, the Court said, by such actions as the adoption of Lord Campbell's Act in England, the enactment of wrongful death statutes in every state in this country, and the creation by Congress of causes of action for wrongful death in several specific areas. Id. at 389-90.

The Court noted further that, from the date of The Harrisburg until 1920, there was no remedy for death on the high seas under federal maritime law and no recovery for death within state territorial waters except when permitted by applicable state statutes. Id. at 393. The Court then observed that, in 1920, Congress passed two landmark statutes to provide a remedy in two specific circumstances. The first, the Death on the High Seas Act, 46 U.S.C. Sections 761, et seq., permitted recovery for "the death of a person" occurring "beyond a marine league (three miles) from the shore of any State" as a result of "wrongful act, neglect, or default." The second, the Jones Act, 46 U.S.C. Section 688, created a cause of action for the death of seamen occurring in the course of employment as a result

of negligence. This Act applied to death occurring both in state territorial waters and on the high seas. 398 U.S. at 394.

At this pre-Moragne stage in the development of admiralty law, a federal cause of action existed for the wrongful death on the high seas of both seamen and non-seamen resulting from either unseaworthiness or negligence. Death on the High Seas Act, 46 U.S.C. Sections 761, et seq. A federal cause of action also existed for the wrongful death of non-seamen in state territorial waters for either unseaworthiness or negligence, and there was no federal cause of action for wrongful death in state territorial waters for unseaworthiness.

It was into this breach that the Court stepped in Moragne. The Court stated that the "efficiency in adjudication" which would result from supplanting "the present disarray in this area with a rule both simpler and more just," 398 U.S. at 405, justified overruling The Harrisburg. The Court announced "a new remedial rule to effectuate well-established primary rules of behavior." Id. at 403. The new rule, the Court states, would recognize "the established expectations of both those who own ships and those who work on them ... that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will generally provide a basis for recovery." Id. at 404.

We believe it is clear from the history of Moragne en route to the Supreme Court, and from the treatment it received on arrival there, that, as the Eleventh Circuit Court of Appeals stated in Ford v. Wooten, 681 F.2d 712, 717 (11th Cir. 1982), cert. denied, ____ U.S. ____ (1983), "the Moragne remedy applies only to unseaworthiness."[2] And, as the Fifth Circuit said in Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 527 (5th Cir. 1979) (en banc), cert. denied, 446 U.S. 956 (1980),

---

[2] Ford v. Wooten was decided subsequent to the trial court's decision in the instant case.

"Moragne did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness."

"Unseaworthiness" is a term of art in the field of admiralty law. The obligation of a ship owner to provide a seaworthy vessel is an absolute duty not satisfied by the exercise of due diligence. Moragne, 398 U.S. at 399. An allegation of negligence, therefore, is not tantamount to an allegation of unseaworthiness.

Yet, there is not one word in Kay's motion for judgment suggesting that she asserts a federal cause of action based upon the unseaworthiness of the vessel upon which Brown met his death. The motion alleges negligence only, and, as indicated, even after Moragne, there

is no federal cause of action for the death of non-seamen in state territorial waters occasioned by negligence;[3] therefore, Kay's cause of action is cognizable only under Virginia law, and she cannot rely upon admiralty law to establish Timothy as a distributee of the fund.

This leaves only Kay's contention that we should hold "a dependent step ... a proper beneficiary under Virginia law." As noted earlier, pertinent here is the portion of Code Section 8.01-53 which previously provided for

---

[3]This case does not come under the Jones Act because Brown was not a seaman.

distribution of a death award to "the surviving spouse, children, and grandchildren of the deceased" (emphasis added).

Kay cites our decision in Carroll v. Sneed, 211 Va. 640, 179 S.E.2d 620 (1971). There, we held that a dependent illegitimate child is a proper distributee under our Death by Wrongful Act statute. In the course of our opinion, we observed that "children are such, no matter what their origin.'" Id. at 643, 179 S.E.2d at 622. It does not follow, however, that stepchildren, whose origins are not of the deceased, qualify for distribution the same as illegitimate children. Instead, we adopt the majority rule that the term "children", as used in death-by-wrongful-act provisions similar to Virginia's statute, does not include

unadopted stepchildren. E.g., Jones v. Jones, 270 Or. 869, 530 P.2d 34 (1974); Klossner v. San Juan County, 93 Wash. 2d 42, 605 P.2d 330 (1980).

Because the trial court apportioned the fund on the incorrect assumption that Timothy was entitled to share in the distribution, we will reverse the judgment appealed from and remand the case for further proceedings not inconsistent with the views expressed in this opinion.

Reversed and Remanded.

APPENDIX A

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON Friday the 2nd day of December, 1983.

PATRICIA ANN BROWN,

Appellant,

against Record No. 810525
Circuit Court No.
L76-1918

KAY J. BROWN, Administratrix of the Estate of Edward Carol Brown, Deceased, Kay J. Brown, Individually, Ronnie Edward Brown, an infant, by his Guardian ad litem, and Timothy Earl Hoggard, an infant, by his Guardian ad litem,

Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk on January 15, 1981, as amended by the order entered January 29, 1981.

For reasons stated in writing and filed with the record, the court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for further proceedings not inconsistent with the views expressed in the written opinion of this court.

The appellant shall recover of the appellees the costs expended in the prosecution of this appeal.

This order shall be certified to the said circuit court.

A Copy,

Teste:

/s/ Allen L. Lucy

Clerk

Appellant's costs

Filing fee	$25.00
Printing brief Code Sec. 14.1-182, not to exceed $200	?
Printing Appendix	?
Attorney's fee	50.00

Teste:

/s/ Allen L. Lucy

Clerk

APPENDIX B

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of January, 1984.

Patricia Ann Brown,

Appellant

against Record No. 810525
Circuit Court No. L76-1918

Kay J. Brown, Administratrix, etc., et al.,

Appellees

Upon a Petition for Rehearing

On consideration of the petition of the appellees to set aside the judgment rendered herein on the 2nd day of December, 1983, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
/s/ Allen J. Lucy
Clerk

APPENDIX C

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 21st day of March, 1984.

Patricia Ann Brown,

Appellant,

against Record No. 810525
Circuit Court No. L76-1918

Kay J. Brown, Administratrix, etc., et al.,

Appellees

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellees, by counsel, praying that the Court defer issuance of its mandate in this case, in order that they may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari or a

petition for appeal to review the judgment of this Court, is it now ordered that the execution and enforcement of the judgment of this Court in the above-styled case rendered on December 2, 1983, and January 20, 1984, be, and the same is hereby, stayed, to and including the 19th day of April, 1984, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that Court.

A Copy,

Teste:

/s/ Allen L. Lucy

Clerk

APPENDIX D

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
Circuit Court of the City of Norfolk

John W. Winston
Judge

100 St. Pauls Blvd.
Norfolk, Va. 23510

October 31, 1980

Alan P. Owens, Esquire
Smith & Owens
P. O. Box 3646
Norfolk, Virginia 23514

James A. Howard, II, Esquire
Breeden, Howard & MacMillan
1700 First Virginia Bank Tower
Norfolk, Virginia 23510

Anthony L. Montagna, Jr., Esquire
Montagna & Copeland
5291 Greenwich Road
Virginia Beach, Virginia 23462

Wiley G. Gary, Esquire
P. O. Box 3503
Norfolk, Virginia 23514

Re: Kay J. Brown, Administratrix of the Estate of Edward Carol Brown, deceased v. Allied Towing Corporation

Gentlemen:

On March 17, 1975, Allied's tank barge ATC 3060 lay afloat in the Elizabeth River, a navigable body of water inside the territorial limits of the Commonwealth of Virginia. An explosion occurred on the barge which took the life of Edward Carol Brown, an Allied employee who was performing repairs to that vessel though not as a crew member.

His wife, Kay J. Brown, retained counsel to seek money damages from Allied. But because an exoneration/limitation proceeding had by that time been filed by Allied in the United States District Court in Norfolk, her suit for damages was temporarily

withheld. Thereafter, U. S. District Judge J. Calvitt Clarke, Jr. ruled that Allied was not entitled to either exoneration from liability or limitation of its liability for claims arising out of the casualty. Judge Clarke also ruled that Allied was not protected from the claims of its injured employees or of their representatives (if killed) by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA, Sec. 901 et seq. Those rulings are now final.

Having thus been allowed to proceed, Mrs. Brown commenced this legal action in this state court seeking money damages from Allied for negligently injuring Edward Carol Brown and thereby causing his death. Claiming the benefit of the general maritime law of the United States, she sought compensatory

damages on behalf of Brown's dependents (listed as his wife Kay J. Brown and his children Ronnie Edward Brown, Timothy Earl Hoggard, and Patricia Ann Brown) for their loss of his support, of his services, of his society, love, affection, care, attention, companionship and protection, for their grief, mental suffering and emotional distress, for the children's loss of his nurture, training, education and guidance, and for the funeral expenses incurred. She also sought punitive damages for his death and compensatory damages for his conscious pain and suffering before he died. (The punitive damage claim was dismissed by the court before trial. The money claim for his conscious pain and suffering has been abandoned since it is now conceded that Brown's death was instantaneous.)

This admiralty death by wrongful act suit came on for trial before a jury on June 18, 1980. Allied conceded liability for its negligence and the jury was instructed to consider the issue of compensatory damages only. A proposed settlement was thereafter agreed on between the parties and the jury trial was discontinued. The settlement amount was $400,000 and was to be paid over and above the workmen's compensation benefits that had already been received by the widow and by the children. Such proposed settlement was approved by this court on July 21, 1980, and a partial distribution to Smith and Owens, attorneys, was ordered. The distribution amounted to $133,333.33 for their contracted legal fees and $1,815.92 for their advanced legal expenses.

The balance of the settlement money amounting to $264,850.75 remained for distribution by the court because no agreement could be reached between the various claimants as to its disbursement. Concerning that remaining issue evidence and legal briefs and the argument have all been presented. Based thereon and its own research this court will now state its findings of fact and conclusions of law. Some preliminary comments however are appropriate.

Until 1970 no cause of action for wrongful death occurring upon navigable waters such as the Elizabeth River was provided by the general maritime law of the United States. The Harrisburg, 119 US 199 (1886); Moragne v. States Marine Lines, Inc., 398 US 375 (1970). A maritime remedy was afforded by adopting the provisions of the wrongful

death statutes of the state on whose waters the death occurred. American Steamboat Co. v. Chace, 16 Wall. 522 (1873); Sherlock v. Alling, Admr., 93 US 99 (1876); The Hamilton, 207 US 398 (1970); Western Fuel Co. v. Garcia, 257 US 210 (1921). This remedy was controlling whether the death action was commenced in a Federal court or in a state court or was commenced in a state court and removed before trial to a Federal court. The general maritime law required the trial court to enforce the provisions of the applicable state death by wrongful act statute just as it was written. The Tungus v. Skovgaard, 358 US 588 (1959); Hess v. United States, 361 US 314 (1960); Goett v. Union Carbide Corp., 361 US 340 (1960).

This literal application of all of the provisions of these state statutes

led to problems and to a Supreme Court review of The Harrisburg principle. According to Gilmore and Black "The Law of Admiralty", 2nd Ed., "The only thing that can be said in favor of the series of cases initiated by The Tungus is that the Court had maneuvered itself into such an untenable and absurb position that the only solution was to tear down the entire stricture and make a fresh start. . ."

That fresh start was made in Moragne v. States Marine Lines, Inc., 398 US 375 (1970). There a longshoreman was killed while working on a vessel which lay in navigable waters within the State of Florida. A wrongful death action was commenced in a Florida state court and removed to a Federal court for trial. Over the decedent estate's objection, the court applied the Florida

wrongful death statute. Since no provision of that law was proven to have been violated, the defendant prevailed. The estate appealed, claiming that it was entitled to reversal under general maritime law without regard to the limited scope of the Florida state statute. The Supreme Court unanimously agreed, overruled The Harrisburg and held that an action does lie under general maritime law for death caused by the violation of maritime duties such as the warranty of seaworthiness. Justice Harlan stated for the court that ". . . our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law..." already in place for personal injury cases (pages 405-406). He added that "In sum, in contrast to the torrent

of difficult litigation that has swirled about The Harrisburg. The Tungus which followed upon it, and the problems of federal-state accommodation their occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters." (page 408).

The question of who should benefit from the application of this new maritime remedy was left unresolved in Moragne. The court only noted that "General maritime law, which denied any recovery for wrongful death, found no need to specify which dependents should receive such recovery." (page 406). It was left to future maritime cases to resolve such subsidiary questions as the measure of damages and the identity of the beneficiaries of such damage awards.

The answer to the measure of damages question was not long in coming. In Sea-Land Services, Inc. v. Gaudet, Admrx., 414 US 573 (1974), Justice Brennan expressed the view of a majority of his brethren that in the new non-statutory general maritime law action for wrongful death the decedent's dependents may recover damages for their loss of support, services, and society as well as funeral expenses. By including loss of society as compensable damage the court disregarded the provisions of both the Federal Death on the High Seas Act, 46 USCA Sec. 761 et seq., and of various state death statutes which limit beneficiary damages to pecuniary loss. It chose to follow the wording of 27 other state wrongful-death statutes permitting recovery for loss of society. It added

that "in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." (But this "special solicitude" is not available in death cases originating on navigable waters outside the territorial waters of the United States. There the directives of Congress control and limit death damages to the pecuniary loss provided for in the Death on the High Seas Act. See Mobil Oil Corp. v. Higginbotham, Admrx., 436 US 618, 625 (1977).

The schedule of beneficiaries to be compensated in non-statutory maritime death cases has not yet been reviewed by the United States Supreme Court. But broad hints have come down as to who can be so listed. Thus in Gaudet, supra,

it is stated that the shape of this judge-made remedy must be guided by the maritime law principle "...that 'certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy when not required to withhold it by established and inflexible rules'..." (page 583). Further, in Gaudet the court spoke repeatedly of the decedent's dependents as such beneficiaries (see pages 573 and 583 for example). And in Higginbotham, supra, the court said that when considering subsidiary issues such as the schedule of beneficiaries "...DOSHA (Death on the High Seas Act) should be the courts' primary guide as they refine the non-statutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in

its own right..." (page 624). That Act names as beneficiaries certain relatives and dependent relatives of decedent.

All of the above leads this court to the firm conclusion that the provisions of the Virginia wrongful death statute shall no longer apply to cases involving the death of non-seaman persons upon the territorial waters of that state, that the non-statutory general maritime law controls instead, that such maritime law uniformity requires both both that the schedule of beneficiaries be the same whether the death occurs in the waters of Virginia or North Carolina or California or Alaska and that such beneficiaries be the same whether death takes place inside or outside the territorial waters of a particular state. Congress having declared that the wife, husband,

parent, child, dependent relative of a person killed outside a state's territorial waters shall be the exclusive beneficiaries of any wrongful death benefits, this court now holds that the same relatives shall likewise be the exclusive beneficiaries of any such benefits derived from a death upon a state's territorial waters.

It further holds that a lawful wife, lawful husband, blood parent, legitimate child, illegitimate child, and adopted child are all beneficiaries automatically and that step-parents, step-children, and others similarly situate may qualify as dependent relatives by means of factual evidence. For "relative" means a person connected with another by either blood or affinity (the connection existing, in consequence of marriage, between each of the married

persons and the kindred of the other). Black's Law Dictionary, 3rd Edition. But live-in "wives" and "husbands" or bigamous mates do not qualify. Bell v. Tug Shrike, 332 F2d 330 (4th Cir. 1964). McPherson v. S/S South Original Corp., et al, 475 F.Supp. 10 (ED Va. 1979). Illegitimate children do so qualify. Middleton v. Luckenbach SS Co., 70 F2d 326 (2nd Cir.) 70 F2d 326, 1934 p.5; Mungin, Admrx. v. Calmar Steamship Corp., 342 F.Supp. 479; also see Carroll v. Sneed, 211 Va. 640 (Va. 1971) and Withrow v. Edwards, 181 Va. 344 (Va. 1943).

Because the status of Kay J. Brown and of Timothy Earl Hoggard as beneficiaries has been contested, those questions will be now considered.

The uncontradicted evidence is that Kay J. Brown has been married three

times. Her first marriage was to Thomas Gilbert Johnson, Jr. on December 28, 1956. They were divorced in Chesapeake, Virginia, a final decree being entered there on October 22, 1964. She then married Cedrick Earl Hoggard on October 31, 1964, in Elizabeth City, North Carolina. To them was born Timothy Earl Hoggard on December 4, 1964. That marriage was terminated by the drowning death of Cedrick Earl Hoggard on August 4, 1965. Then on June 10, 1966, she again was marriage, this time to Edward Carol Brown. They lived together as man and wife until his death on March 17, 1975. She bore him a son, Ronnie Edward Brown, born December 15, 1968. A child had been born to Edward C. Brown during his previous marriage, that being Patricia Ann Brown, born July 9, 1962.

The court finds that Kay J. Brown was and is the lawful wife and widow of Edward Carol Brown. Her marriage to Cedrick Earl Hoggard was a lawful one, though they were married nine days after her divorce from Thomas Gilbert Johnson, Jr. became final. And Hoggard had died before she married Edward Carol Brown.

Turning to Timothy Earl Hoggard, he is unquestionable the blood son of Kay J. Brown by her then husband Cedrick Earl Hoggard. He resided with and was raised by his parents until Cedrick Earl Hoggard was drowned. Parental responsibility for Timothy's upbringing was assumed by his mother until she married again. From that time on Timothy resided with and was raised by his mother and by his step-father Edward Carol Brown and partly supported by him. Though Timothy was never adopted by his

step-father, as step-son in this case he is declared to occupy the status of decedent's dependent relative.

There are then four beneficiaries entitled to share the proceeds of this settlement: Kay J. Brown, decedent's lawful wife and now widow; Timothy Earl Hoggard, step-son of decedent and his dependent relative; Ronnie Edward Brown, his natural son; and Patricia Earl Brown, his natural daughter.

We come now to the final question which is the value of those shares to the four beneficiaries.

The uncontradicted evidence is that from the time her parents were divorced Patricia Ann Brown lived exclusively with her mother in North Carolina. (When she was twelve she elected not to live with her father.) By a court order entered there, Edward C. Brown was

directed to pay $7.50 a week toward her financial support. This he did until around the middle of 1967, when for financial reasons he stopped paying anything. These payments were never resumed. No other financial support or other material benefits were ever thereafter provided Patricia Ann Brown by her father before his death in 1975. He visited with her briefly on infrequent occasions when in North Carolina to see his own parents. But such visits were not in her home there. And they averaged once or twice a year. She once visited him in Virginia by going to his brother's house in Chesapeake. She last talked with her father when she called him by telephone a year before he died. That he loved Patricia and was proud of her is unquestioned.

Having lost no financial contributions by her father's death, Patricia is entitled to no award for loss of support. Since her father provided her with little in the way of nurture, training, education, and guidance as she grew toward maturity, only a nominal award can be made for the loss of her father's services caused by his death. But since "society" includes the mutual benefits of love, affection, care, attention, companionship, comfort, and protection, a reasonable award should be allowed her for the loss of society caused by his death. Patricia was almost fourteen years old when her father died. He was then thirty years of age, he had a life expectancy of 40.9 years (Exhibit 6 - Va. Code Section 8.01-419). Her loss of services is

valued at $1,000.00. Her loss of society is valued at $6,000.00.

Timothy Earl Hoggard came into his step-father's household on June 10, 1966, when the marriage of his mother to Edward C. Brown took place. He remained there until his step-father died on March 17, 1975. Timothy was then eleven years of age. That he lost financial support by his step-father's death is unquestioned. His necessities such as food, clothing, shelter, school expenses, spending money, and the like were furnished by his step-father, except that Timothy's monthly social security check of $115.00 went toward the whole family's bills. All of Edward C. Brown's earnings went toward the family's monthly expenses also. No savings were possible from either source of income. Mr. Brown's take-home pay in

1974 amounted to $11,382.10 (Exhibit P 10). Until his death on March 17, he took home pay totaling $2,794.25 (Exhibit P 8). Since this amount represented two and one-half months work, it can be estimated that Brown would have taken home $13,420.00 during the full year 1975. Brown had worked as a welder, both 3rd and 1st class, a shipfitter 1st class, and a leadingman. He was working as a supervisor when he died. According to the evidence he was a responsible and constant worker. Raises in take-home pay on an annual basis could be anticipated which the court fixes at 8% per year.

Timothy will be eighteen years old on December 4, 1982. His loss of support is valued at $4340.00 (reduced because of his monthly contribution of $115.00 social security check).

Ronnie Edward Brown was seven years old when his father died. Ronnie was a member of that household all of those years. All of his financial support came from Edward C. Brown. Ronnie will be eighteen years of age on December 15, 1986. His loss of support is valued at $22000.00.

Both boys were helped by Edward C. Brown with their school work. He fished with them, played ball with them, did other things with them. He treated both boys equally in all respects. Ronnie being older was in the Boy Scouts and his step-father took an interest in these activities. This loss of services is valued at $7000.00 for Timothy and $11000.00 for Ronnie.

Mutual love and affection existed between the boys and their father/step-father. With that went the

care and attention, companionship, comfort and protection that comprise "society." That loss is valued at $20000.00 for Timothy and the same for Ronnie.

Kay J. Brown was a faithful wife to Edward C. Brown. That he performed his expected duties as her husband is unquestioned. He loved her, provided her with a home and other necessities within his means, gave her care and attention. Her loss of support, services, and society is valued at the balance of the settlement fund available after she is repaid the funeral expenses she incurred amounting to $1508.60. That balance (less those funeral expenses) is $172,002.15.

Counsel for the Administratrix is requested to submit a proposed decree making the distribution as ordered.

Very truly yours,

/s/ John W. Winston

John W. Winston
Judge

JWW:se

cc: William B. Eley, Esq.
John B. King, Jr., Esq.

P.S. See Attachment

SUMMARY OF DISTRIBUTION

Net Settlement Amount for Distribution		$264,850.75
Less Distribution To:		
Patricia Ann Brown		
(1) Loss of Support	1,000.00	
(2) Loss of Services ($150 for 40 years)	6,000.00	
Total	$7,000.00	
Timothy Earl Hoggard		
(1) Loss of Support ($2,000 - 1,380 = 620 for 7 years)	4,340.00	
(2) Loss of Services ($1,000 for 7 years)	7,000.00	
(3) Loss of Society ($500 for 40 years	20,000.00	
Total	$31,340.00	
Ronnie Edward Brown		
(1) Loss of Support ($2,000 for 11 years)	22,000.00	
(2) Loss of Services ($1,000 for 11 years)	11,000.00	
(3) Loss of Society ($500 for 40 years)	20,000.00	
Total	$53,000.00	
Kay J. Brown		
(1) Funeral Expense	1,508.60	
(2) Loss of Support, services and society	172,002.15	
Total	$173,510.75	
TOTAL DISTRIBUTION		$264,850.75

APPENDIX E

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

KAY J. BROWN, Administratrix of the Estate of EDWARD CAROL BROWN, deceased

Plaintiff,

v. AT LAW NO. L 76 1918

ALLIED TOWING CORPORATION,

Defendant

O R D E R

This matter stands upon the motion of Kay J. Brown, Administratrix of the Estate of Edward Carol Brown, deceased, for an Order apportioning to the decedent's dependents, after attorney's fees and costs, the net proceeds of the $400,000.00 settlement approved by this Court on July 21, 1980.

After appointing guardians ad litem for those claiming as minor dependents of the decedent, the Court heard

evidence, the arguments of counsel and reviewed the written memoranda of law filed on behalf of the respective claimants. The Court thereafter issued its letter opinion dated October 31, 1980, which is incorporated by reference as if restated in full herein.

Therefore, pursuant to the letter opinion of October 31, 1980, it is ORDERED, ADJUDGED and DECREED:

1. There are four persons entitled to share the proceeds of this settlement: Kay J. Brown, decedent's lawful wife and now widow; Timothy Earl Hoggard, natural child of Kay J. Brown, and stepson of decedent and his dependent relative; Ronnie Edward Brown, his natural son; and Patricia Ann Brown, his natural daughter.

Kay J. Brown,	
Funeral expenses	1,508.60
Kay J. Brown,	
As widow	172,002.15
Ronnie Edward Brown	53,000.00
Timothy Earl Hoggard	31,340.00
Patricia Ann Brown	7,000.00
Total Distribution	$264,850.75

2. The Court awards as attorney's fees, the sum of $350.00 to Anthony L. Montagna for legal service as guardian ad litem for the infant beneficiary Timothy Earl Hoggard; and a like sum of $350.00 to Wiley G. gary for legal services as guardian ad litem for the infant beneficiary Ronnie Edward Brown. These sums are to be paid out of the gross amounts awarded to Ronnie Edward Brown and to Timothy Earl Hoggard.

It appearing to the Court that by prior court order, the net settlement funds have been deposited in interest bearing accounts; any interest earned to the date of actual distribution of the settlement after payment of the approved fees for the guardian ad litem shall be apportioned pro rata in accordance with each beneficiaries' percentage share of the total amount for distribution.

It further appearing that Timothy Earl Hoggard and Ronnie Edward Brown are still minors, it is ORDERED that the sums to which they are entitled shall be paid, upon her proper qualification to Kay J. Brown, as guardian of their respective estates, to be invested and used for the benefit of said minors according to law until they become of legal age. Bond 's fixed at Sixty Thousand ($60,000.00) Dollars, with

surety in the case of Ronnie Edward Brown and at Thirty-five Thousand ($35,000.00) Dollars with surety in the case of Timothy Earl Hoggard.

It is further ORDERED that the transcripts of the testimony taken on July 7, 1980, of Kay J. Brown and Patricia Ann Brown, the only witnesses to testify in this proceeding, be, and they hereby are, made a part of the record in this matter.

Distribution having now been Ordered and it appearing to the Court that nothing remains to be done in this cause, this matter is dismissed with prejudice.

ENTER

On the 15th day of
January, 1981

/s/ John W. Winston, Judge

WE ASK FOR THIS:

/s/ Alan P. Owens

Alan P. Owens, Counsel for Plaintiff

/s/ Anthony L. Montagna

Anthony L. Montagna, guardian ad litem
for Timothy Earl Hoggard

/s/ Wiley G. Gary

Wiley G. Gary, guardian ad litem
for Ronnie Edward Brown

SEEN AND OBJECTED TO:

/s/ S. Miles Dumville

S. Miles Dumville, counsel for
Patricia Ann Brown

APPENDIX F

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

KAY J. BROWN, Administratrix
of the estate of Edward Carol
Brown, deceased,

Plaintiff

v. PLAINTIFF DEMANDS A JURY
L-76-1918

ALLIED TOWING CORPORATION
100 Avory Street
Norfolk, Virginia

Defendant

SERVE: Jeanne M. Collins
Assistant Secretary/Treasurer
Allied Towing Corporation
100 Avory Street
Norfolk, Virginia

The plaintiff moves for judgment against the defendant and for her cause of action alleges as follows:

1. The plaintiff is the Administratrix of the Estate of her deceased husband, Edward Carol Brown, who met his death on March 17, 1975.

She duly qualified in the Circuit Court of the City of Chesapeake, on the 7th day of April 1975.

2. That plaintiff's decedent met his death on March 17, 1975 in the explosion and fire of Tankbarge ATC 3060 which was owned and operated by the defendant at all material times hereto.

3. That plaintiff's decedent met his death as a direct and proximate result of the negligence of the defendant acting as a ship owner.

4. That the plaintiffs decedent left surviving and dependent upon him, his wife, Kay J. Brown, and three minor children, Ronnie Edward Brown, Timothy Earl Hoggard and Patricia Ann Brown.

5. As a result of the explosion and fire destroying ATC Tankbarge 3060, the defendant herein on April 10, 1975, filed a Complaint in the United States

District Court for the Eastern District of Virginia, Norfolk Division, seeking exoneration from a limitation of liability. Plaintiff was required by Court Order to participate in that proceeding initiated by the defendant.

6. Defendant's complaint came on for trial and thereafter on March 9, 1976 the United States District Court entered on Amended Memorandum Opinion and Order, attached hereto as Exhibit "A" denying defendant's petition for exoneration from or to limitation of liability.

7. Subsequent to the Court's Order of March 9, 1976, the defendant Allied, moved the U. S. District Court for Summary Judgment, claiming that the plaintiff's claim herein, among others, was specifically barred by the 1972

Amendments to Longshoremans & Harbor Workers Act.

8. That on August 2, 1976, in response to defendants motion for Summary Judgment the U. S. District Court entered a Memorandum Opinion and Order finding the defendant and the vessel ATC 3060 guilty of non-excluded owner occassioned negligence which contributed to the explosion and therefore denied the defendants Motion for Summary Judgment. In the same Order the U. S. District Court dissolved the Restraining Order entered at defendants request on April 10, 1975 this permitting the plaintiff herein to proceed with this action in the forum of her choice. This Order appears as Exhibit "B".

9. This Claim is governed by the General Maritime Law of the United States.

10. As a result of defendant shipowners negligence as established in prior proceedings between the same parties the plaintiff is entitled to recover compensatory damages of the defendant for the loss of support including all the financial contributions that the decedent would have made to his dependents over the years had he lived; for the loss of services; loss of society, love, affections, care, attention, companionship and protection; for the decedents conscious pain and suffering; the grief, mental suffering and emotional distress of his dependent survivors; the children's loss of nurture, training, education and

guidance; and funeral expenses as well as other damages under the applicable law.

Plaintiff is also entitled to recover punitive or exemplary damages because in addition to the negligence heretofore found the defendant was also guilty of wanton, willful, reckless conduct and criminal indifference to the applicable federal statutes licensing and regulating the use of the Tankbarge ATC 3060 in that the defendant willfully and recklessly caused the Tankbarge ATC 3060 to transport a grade of fuel that it was not certified to carry pursuant to Coast Guard regulations. This willful and wanton violation of Coast Guard regulations was a direct and proximate cause of the explosion giving rise to the death of plaintiff's decedent.

WHEREFORE, the plaintiff moves the Circuit Court for the City of Norfolk, Virginia, for judgment against the defendant for the death of Edward Carol Brown in the sum of ONE MILLION EIGHT HUNDRED THOUSAND ($1,800,000.00) DOLLARS plus interest from March 17, 1975 together with costs of this action.

KAY J. BROWN

By_____
Of Counsel

Alan P. Owens
Smith, Power and Owens
1412 Maritime Tower
Norfolk, Virginia 23510

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

KAY J. BROWN, Administratrix
of the Estate of Edward Carol
Brown, Deceased,

Plaintiff

v. CIVIL ACTION
NO. 77-124-N

ALLIED TOWING CORPORATION,

Defendant.

O R D E R

This action grows out of an accident of March 17, 1975, when the plaintiff's decedent lost his life in an explosion and fire aboard the Tankbarge ATC 3060 owned and operated by Allied Towing Corporation (Allied). At the time of the explosion and fire, plaintiff's decedent was performing maritime services aboard said Tankbarge, which barge was then in navigable waters

at Norfolk. Following such explosion and fire, on April 10, 1975, in Civil Action 75-151-N, Allied filed a complaint in this Court seeking exoneration from a limitation of liability from said explosion and fire, pursuant to 46 U.S.C. Section 181, et seq. All claimants were enjoined from prosecution of claims except in the limitation proceeding. Thereafter, on March 9, 1976, the Court denied Allied's petition for exoneration, ruling that its negligence proximately caused the explosion (Complaint of Allied Towing Corporation, 409 F.Supp. 180 (D.C. Va. 1976)), and subsequently, on August 2nd, 1976, dissolved the Restraining Order entered April 10, 1975, "thus permitting claimants to proceed with the actions and repair to the forum of their

choice."[1] Complaint of Allied Towing Corporation, etc., 416 F.Supp. 1207 (D.C. Va. 1976). The denial of exoneration and permitting the actions against Allied was affirmed by the Fourth Circuit July 18, 1978, 580 F.2d 702.

On November 24, 1976, plaintiff filed an action against Allied in the Circuit Court of the City of Norfolk, Virginia, which Allied answered. That action is still pending, having been continued generally. Subsequently, on February 11, 1977, plaintiff filed this action, being then of the opinion plaintiff could have a jury trial in

---

[1] Actions previously instituted against Allied.

this Court on the issues involved. She made request for a jury trial, which was denied by Order of January 22, 1980. She now moves the Court to be permitted to dismiss this action without prejudice and to prosecute her claim in the State Court.

Plaintiff in good faith relied upon an assumption she was entitled to a jury trial in this Court. However, the Court has since ruled she is not entitled to a jury trial. Subsequent to the decision of the Supreme Court in Maryland Casualty Company v. Cushing, 347 U.S. 409, 74 S.Ct. 608; Just v. Chambers, 321 U.S. 383, 61 S.Ct. 687; The Linseed King, 285 U.S. 502, 52 S.Ct. 451; Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U.S. 207, 47 S.Ct. 357; Richardson v. Harmon, 222 U.S. 96, 32 S.Ct. 27; Providence & New

York S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 3 S.Ct. 378, holding that the admiralty court has exclusive jurisdiction of such actions and retains it to grant complete relief, even if the Court finds the petitioner is not entitled to limitation, it decided the case of Lake Tankers Corporation v. Henn, 354 U.S. 147, 77 S.Ct. 1269. Here it held that (1) where the value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner, exceeds the claims made against it, there is no necessity for the maintenance of the concourse, [77 S.Ct. 1272], and (2) that in such circumstances or where limitation has been denied, a claimant may proceed with his state court action where he can obtain trial by jury. [77 S.Ct. 1272-3].

In effect, the holding is that the admiralty court, having taken jurisdiction, does not have and retain exclusive jurisdiction where limitation is denied or where the amount of the claims do not exceed the "value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner," [77 St.Ct. 1272] that there is no necessity for the maintenance of a concourse, and the claimant is not be be "thwarted in her attempt to employ her common law remedy in the state court where she may obtain trial by jury." [77 St.Ct. 1273].

In summary, plaintiff filed action in the State Court, where she sought trial by jury. Believing in good faith she could obtain a jury trial in her action in this Court, she thereafter

filed this action in this Court and moved for a jury trial. She now seeks to dismiss this case and to prosecute the State Court action where she may have a jury trial.

Rule 41(a)(2) permits a dismissal upon order of the Court. Plaintiff has moved for such a dismissal without prejudice. Such a dismissal is within the discretion of the Court. It is a judicial discretion, subject to review for abuse. Under the circumstances of this case, I am of the opinion the permission to dismiss should be granted to enable plaintiff to prosecute her claim in the State Court where she may have trial by jury. The motion to dismiss her action without prejudice is therefore GRANTED and the Clerk is

directed to dismiss this action on motion of the plaintiff, without prejudice to her right to prosecute the claim in the State Court.

/s/ Richard B. Kellam, Sr.

United States
District Judge

Norfolk, Virginia

March 10, 1980

APPENDIX H

UNITED STATES OF AMERICA,

Appellee,

v.

THE ALLIED TOWING CORPORATION,

Appellant.

No. 77-2300

United States Court of Appeals

Fourth Circuit.

Argued Dec. 8, 1978.

Decided June 20, 1979.

Towing company was convicted before the United States District Court for the Eastern District of Virginia, Walter E. Hoffman, Senior District Judge, of violating statute providing criminal penalties against shipowners whose violation of the law causes the death of any person, and it appealed. The Court

of Appeals, Butzner, Circuit Judge, held that: (1) statute is not limited to homicides occurring within the special admiralty jurisdiction but includes homicide occurring on navigable waters which are within the federal admiralty jurisdiction as well as in the territorial jurisdiction of a State and (2) although district court received evidence, in form of a stipulation, before disposing of motion to dismiss for lack of jurisdiction, defendant was not placed in double jeopardy when it was tried under new indictment on the same evidence since the prior ruling addressed only the jurisdictional issue and the court did not touch on the merits.

Affirmed.

G.W. Birkhead, Norfolk, Va. (Vandeventer, Black, Meredith & Martin, Norfolk, Va., on brief) for appellant.

Paul G. Gorman, Jr., Crim. Div. Dept. of Justice, Washington, D.C. (William B. Cummings, U.S. Atty., Alexandria, Va., on brief), for appellee.

Before BUTZNER, HALL and PHILLIPS, Circuit Judges.

BUTZNER, Circuit Judge:

Allied Towing Corporation appeals a conviction under 11 U.S.C. § 1115, which provides criminal penalties against shipowners whose violation of the law causes the death of any

person.[1] Allied was convicted for the homicide of two employees who died in an explosion while they were welding the hull of an Allied tank barge at a pier on the Elizabeth River in Norfolk, Virginia. The evidence showed that Allied permitted the welding without securing the gas-free certification required by Coast Guard regulations and that ignition of gases within the barge caused the fatal explosion. On appeal, Allied assigns error to the district court's denial of motions to dismiss for lack of jurisdiction and double jeopardy. We affirm.

---

[1] § 1115, Title 18 U.S.C., provides:

Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, officer, through whose fraud, neglect, connivance, (Footnote continued)

The original indictment against Allied charged that the offense occurred "in the Eastern District of Virginia and within the jurisdiction of this Court." Allied filed a timely motion to dismiss for lack of jurisdiction. On the day set for a bench trial, the district court--without first disposing of Allied's motion--received all of the evidence in the form of a stipulation by both parties. After examining the stipulation, the court ruled that it was without jurisdiction.

(Footnote Continued)
misconduct, or violation of law the life of any person is destroyed, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect,

The government then secured a second indictment which charged that the offense occurred "on the Elizabeth River, a navigable water of the United States, within the Eastern District of Virginia, and within the admiralty jurisdiction of the United States." Allied again sought dismissal for lack of jurisdiction. It also moved to dismiss on the ground that the second indictment violated the double jeopardy clause of the fifth amendment. The district court denied both motions and rendered a judgment of conviction on the basis of a stipulation identical to the one filed before the first dismissal.

(Footnote Continued)
connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

I.

[1] Although 18 U.S.C. § 1115 contains no jurisdictional limitation, Allied contends that it proscribes only homicides committed within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7.[2] The special maritime jurisdiction does not include navigable

---

[2] § 7, Title 18 U.S.C. provides in part:

The term "special maritime and territorial jursdiction of the United States", as used in this title, includes:
(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whose or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such (Footnote Continued)

offenses against the laws of the United States.

Since § 1115 itself contains no express jurisdictional language, we must look to its history in order to ascertain its reach. The earliest precursor of § 1115 appeared in 1838 as part of an act to prevent boiler explosions on steamboats plying "the bays, lakes, rivers, or other navigable

---

(Footnote continued)
vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constituted the International Boundary Line.

waters within the federal admiralty jurisdiction that are also within the territorial jurisdiction of a particular state. Since the Elizabeth River is within Virginia's territorial jurisdiction, Allied argues, the district court had no jurisdiction over this case.

The government acknowledges that the Elizabeth River is within Virginia's jurisdiction, but it contends that § 1115 is not subject to the definition of the special maritime jurisdiction in § 7. The government insists that Congress intended § 1115 to reach homicides committed anywhere within federal admiralty and maritime jurisdiction, regardless of any state's concurrent power to punish for the offense.

The issue, therefore, is whether the limitation in § 7 prevents the application of § 1115 to a homicide that occurred on navigable waters within both the general admiralty jurisdiction of the United States and the territorial waters of Virginia. Unless § 7 modifies § 1115, Allied's conviction must stand because 18 U.S.C. § 3231 gives federal district courts jurisdiction over all waters of the United States."[3] The statute provided for the prosecution of officers or crewmen whose negligence caused the death of any person aboard their vessel.[4]

---

[3]Act of July 7, 1838, ch. 191, § 2,5 Stat. 304.

[4]Id. § 12,5 Stat. 306

In 1871, Congress enacted a comprehensive statute "to provide for the better Security of Life" on board steamships.[5] The law regulated "steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation."[6] § 57 of the act[7] is the prototype of the statute under which Allied was convicted.

---

[5]Act of Feb. 28, 1871, ch. 100, 16 Stat. 440.

[6]Id. § 41, 16 Stat. 453.

[7]Id., 16 Stat. 456.

The Revised Statutes of 1874 denominated § 57 as § 5344 and placed it in a chapter dealing with crimes arising within the maritime and territorial jurisdiction of the United States.[8] Other statutes in the same chapter--such as those prohibiting murder, manslaughter, and rape--expressly precluded federal jurisdiction over violations occurring on waters within the jurisdiction of any state.[9] § 5344, however, contained no such restriction.

---

[8] 18 Stat. 1038.

[9] E.g., Rev.Stat. § 5339, 5341, 5345, 18 Stat. 1038.

United States v. Holtzhauer, 40 F.76, 78 (C.C.D.N.J.1889), sustained an indictment brought under Revised Statute § 5344, despite the defendant's objection that the statute did not apply to a homicide committed on navigable waters within the jurisdiction of New Jersey. The history of the statute and the Holtzhauer decision demonstrate conclusively that Congress intended this antecedent of § 1115 to reach violations occurring anywhere within the general admiralty and maritime jurisdiction of the federal courts.[10]

The 1909 revision of the penal laws, however, expressly restricted the

---

[10] In 1905, Congress added to Rev.Stat.§ 5344 a provision substantially the same as the second paragraph of present 18 U.S.C. § 1115 Act of Mar. 3, 1905, ch. 1454, § 5, 33 Stat. 1025.

reach of the statute. Congress codified Revised Statute § 5344 in § 282 of the new Criminal Code.[11] There the statute was subject to the definition of the special maritime and territorial jurisdiction in Criminal Code Section 272, the prototype of 18 U.S.C. § 7. Thus, the law no longer applied to homicides committed on waters within the territorial jurisdiction of any state.[12] The 1926 recodification of the federal statutes placed Criminal Code §§ 272 and 282 in 11 U.S.C. §§ 451 and 461, but the jurisdictional limitation engrafted onto the homicide section remained in force.[13]

---

[11] Act of Mar. 4, 1909, ch. 321, 35 Stat. 1144.

[12] Id., 35 Stat. 1142.

[13] Act of June 30, 1926, ch. 712, 44 Stat. 498, 499.

The jurisdictional restriction disappeared in 1948, when Congress revised and reenacted the criminal statutes. The old chapter on crimes within the special maritime and territorial jurisdiction was abolished, and its component sections were distributed into other parts of Title 18.[14] The definition in old 18 U.S.C. § 451 moved to its present place in 18 U.S.C. § 7.[15] What had been 18 U.S.C. § 461 went into the homicide chapter as 11 U.S.C. § 1115.[16] Although the old jurisdictional qualification was preserved by adding

---

[14] See H.R.Rep.No. 304, 80th Cong., 1st Sess. A6-A7 (1947).

[15] Act of June 25, 1948, ch. 645, 262 Stat. 685.

[16] Id. 62 Stat 757.

new language to other sections taken from the chapter on maritime offenses,[17] § 1115 became a statute of general application. The reviser's note explained the reason for the change:

Section [1115] restores the intent of the original enactments, R.S. § 5344, and act Mar. 3, 1905, ch. 1454, § 5, 33 Stat. 1025, and makes this section one of general application. In the Criminal Code of 1909, by placing it in Chapter 11, limited to places within the special maritime and territorial jurisdiction of the United States, such

---

[17] E.G., id., 62 Stat. 756, 795 (current versions at 11 U.S.C. §§ 1111, 1112, 2031); See H.R.Rep. No. 304, 80th Cong., 1st Sess. A6 (1947).

original intent was inadvertently lost as indicated by the entire absence of report or comment on such limitation.[18]

Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959), appears to be the only case that discusses the reach of federal jurisdiction under 11 U.S.C. § 1115. In Hoopengarner, the defendant was convicted under § 1115 for the homicide of a woman who fell from a yacht with which his boat collided on connecting waters in the Great Lakes. The court found that the

---

[18] H.R.Rep.No.304, 80th Cong., 1st Sess. A91 (1947). To the extent that the reviser's note on 18 U.S.C. Sec. 1115 is inconsistent with his note on 18 U.S.C. § 7, we think that the specific note on § 1115 more clearly expresses the intent of Congress.

incident occurred within the special maritime jurisdiction defined by 18 U.S.C. § 7 and sustained the conviction. Since § 7 provided a basis for jurisdiction, the court did not consider whether § 1115 could be invoked where the homicide occurred within the general admiralty jurisdiction but outside the special maritime jurisdiction. Hoopengarner, therefore, is not dispositive of this appeal.

Section 1115 differs from statutes dealing with crimes such as murder that happen to be committed in areas where both the state and federal governments have an interest. The restriction contained in § 7 shows that Congress left the prosecution of such crimes to the state. The history of § 1115

discloses, however, that Congress enacted this statute as an integral part of its regulation of the nation's maritime commerce. As the reviser of the 1948 code explained, § 1115--like Revised Statute § 5433 and its predecessors-- reaches homicides committed anywhere within the general admiralty jurisdiction of the federal courts. We therefore hold that the district court had jurisdiction to convict Allied for violating § 1115 on the navigable waters of the Elizabeth River.

II.

[2,3] Allied also argues for reversal on the ground that the indictment under which it was convicted violated the fifth amendment guarantee against double jeopardy. Since jeopardy attached under the original indictment

when the district court received the stipulated evidence before granting Allied's motion to dismiss, Allied contends, conviction under a second indictment for the same offense is unconstitutional.

In Finch v. United States, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), on which Allied relies, the Supreme Court held that the double jeopardy clause prevented the government from appealing a dismissal entered after the district court had received and agreed statement of facts. The district court in Finch, however, addressed factual elements of the crime charged and based the dismissal on its conclusion that the information against the defendant failed to state an offense. See United States v. Finch, 395 F.Supp. 205, 207, 210, 213

(D.Mont.1975). Thus, the dismissal resolved questions determinative of guilt in favor of the defendant. See 433 U.S. at 677, 97 S.Ct. 2909.

We believe that Finch does not require reversal of Allied's conviction. When the district court considered the first indictment against Allied, it received a stipulation agreed to be the only evidence in the case. The court's ruling, however, addressed only Allied's motion to dismiss that indictment for lack of jurisdiction. The court touched on none of the merits of the charge. Because the ruling did not resolve in the defendant's favor any factual element of the offense charged, the government could rectify the deficiency in its original case and proceed to trial on a new indictment even though the district court had received evidence

under the first indictment. See United States v. Scott, 437 U.S. 82, 96-97, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); Lee v. United States, 432 U.S. 23, 30, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977). Dismissal of an indictment for failure to show jurisdictional facts cannot bar prosecution under a good indictment. See Wolkoff v. United States, 84 F.2d 17 (6th Cir. 1936). We therefore hold that trial on the second indictment did not subject Allied to double jeopardy.

Affirmed.

APPENDIX I

In the Matter of the Complaint of ALLIED TOWING CORPORATION as owner of the TANKBARGE ATC 3060, limitation of liability, Appellant

v.

Leonard TATEM, Lum C. Plum, Earl D. Kennedy, Kay J. Brown, as Administratrix of the Estate of Edward Carol Brown, Deceased, The Aetna Casualty and Surety Company, William Roland Sloan, and Edgar J. Rhodes, Administrator of the Estate of Terrance L. Rhodes, Deceased, Appellees,

No. 77-1648

United States Court of Appeals

Fourth Circuit

Argued April 5, 1978

Decided July 18, 1978.

Owner of barge filed petition in admiralty for exoneration or limitation of liability arising out of explosion of barge. The United States District Court for the Eastern District of Virginia, at

Norfolk, J. Calvitt Clarke, Jr., J., 406 F.Supp 180, denied barge owner's petition, and barge owner moved for summary judgment on personal injury and death claims asserted by its employees or their personal representatives. The United States District Court for the Eastern District of Virginia, at Norfolk, J. Calvitt Clarke, Jr., J., 416 F.Supp 1207, denied motion, and subsequently entered final judgment dismissing barge owner's exoneration and limitation petition with prejudice, and barge owner appealed. The Court of Appeals held that: (1) evidence sustained finding that use of barge to carry fuel for which it was not certified was a proximate cause of explosion; (2) injured employees of barge owner were not barred by Longshoremen's and Harbor Workers

Compensation Act from recovering damages from barge owner for injuries sustained in barge explosion, and (3) barge owner was exonerated from liability to its employees who were engaged as repairmen for injuries sustained in barge explosion to the extent that such injuries were caused by the negligence of persons repairing the vessel.

Affirmed in part and vacated in part and cause remanded.

Charles F. Tucker, Norfolk, Va. (John B. King, Jr., Vandeventer, Black, Meredith & Martin, Norfolk, Va., on brief) for appellant.

Alan P. Owens and Ralph Rabinowitz, Norfolk, Va., for appellees.

Before BUTZNER, Circuit Judge, LAY, Circuit Judge for the Eighth Circuit, sitting by designation, and RUSSELL, Circuit Judge.

PER CURIAM:

Allied Towing Corp. appeals from an order of the district court denying a petition in admiralty for exoneration or limitation of liability. It also appeals the court's denial of summary judgment with respect to claims involving interpretation of the Longshoremen's and Harbor Workers' Compensation Act. We sustain the district court's rulings but remand the case for modification of the judgment in light of an intervening decision of this court.

I.

Numerous death, personal injury, and property damage claims arose from the explosion of a barge owned by Allied

while it was being repaired by Allied employees at Allied's dock. Allied promptly petitioned for exoneration or limitation of liability. The evidence disclosed that immediately before the explosion, the barge carried a grade of fuel for which it was not certified by the Coast Guard. The flash point range for this fuel was lower than the range for the fuel that properly could have been carried. When a leak was detected, the barge was brought in for repairs, but the fuel tanks were not freed of residual gas before employees started welding.

On March 9, 1976, the district court denied Allied's petition for exoneration, ruling that its negligence proximately caused the explosion in three respects: failure to insure that

the barge transported only grades of fuel for which it was certified under Coast Guard regulations, failure to provide a systematic method to secure gas free certifications or to assure the gas freeing of a vessel before repairs were commenced, and failure to procure a gas free certificate prior to commencing welding. The court also found that Allied's supervisory personnel were privy to all three aspects of the negligence and therefore denied the request for limitation of liability. This decision is reported as Complaint of Allied Towing Corp., 409 S.Supp. 180 (E.D.Va. 1976).

Relying on the theory that the Longshoremen's and Harbor Workers' Compensation Act bars an employee engaged in Ship Repair from suing his

employer, Allied then moved for summary judgment on the personal injury and death claims asserted by its employees or their personal representatives. On August 2, 1976, the court ruled that the negligent carrying of an improper grade of fuel was imputable to Allied in its capacity as a shipowner and that the claimants could maintain actions under the Act for that negligence. It barred the cause of action based on Allied's negligence in repairing the vessel. The court also dissolved an earlier order restraining claimants from instituting actions against Allied in other forms. This decision is reported as Complaint of Allied Towing Corp., 416 F.Supp 1207 (E.D.Va.1976).

A property damage claim asserted by Aetna Casualty and Surety Co. remained

before the district court, which granted Aetna's motion for summary judgment on January 26, 1977.* On February 17, 1977, the court entered a final order dismissing Allied's exoneration and limitation petition with prejudice. This appeal promptly followed.

II.

[1] The appellees contend that Allied failed to take timely appeals from the order of March 9, denying exoneration and limitation of liability,

---

*We summarily affirmed the judgment in favor of Aetna. Allied Towing Corp. v. Tatem, No. 77-1648 (4th Cir., March 30, 1978) (unpublished.)

and from the order of August 2, denying Allied's motion for summary judgment and dissolving the stay. Allied, however, was under no compulsion to appeal these interlocutory orders. See 16 Wright, Miller, Cooper, and Gressman, Federal Practice and Procedure §3927, at 124 (1977); 9 Moore's Federal Practice ¶ 110.18, at 205-07, ¶110.19[3], at 209 (2d ed. 1973). Allied filed a timely notice of appeal from the final judgment rendered after Aetna's claim was tried. This court therefore has jurisdiction over all issued raised on appeal.

III.

[2,3] Allied assigns error to the ruling that use of the barge to carry fuel for which it was not certified was a proximate cause of the explosion. It

also challenges the district court's holding that the injured employees are not barred by the Compensation Act from recovering damages from allied in its capacity as shipowner. We affirm these aspects of the district court's judgment for reasons adequately stated in its opinions, Complaint of Allied Towing Corp., 409 F.Supp. 180 and 416 F.Supp. 1207 (E.D.Va.1976). The district Court's imposition of liability on Allied in its capacity as owner for negligent use of the barge, as distinguished from its negligence as repairer, is supported by Judge Gibbon's exhaustive opinion in Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 38-44 (3d Cir. 1975), which deals with this same issue in a different factual context.

[4] The employees' recovery against Allied in its capacity as a shipowner is restricted, however, by the principles explained in Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153 (4th Cir. 1978) (en banc). There we held that when a longshoreman is injured through the combined negligence of the ship and the stevedore, as well as through his own negligence, he may recover from the ship only "that proportion of the total damages which matches [the ship's] proportion of fault." 577 F.2d at 1154. We now hold that the same restriction on recovery of damages applies to an employee engaged as a repairman. 33 U.S.C. § 902(3) (Supp. II 1972). Allied therefore is exonerated to the extent that the injuries to its employees were caused by the negligence

of persons repairing the vessel. 33 U.S.C. § 905(b). Since the district court did not apportion Allied's fault between its capacities as repairer and owner, the case must be remanded for further proceedings in light of Edmonds.

The judgments of the district court are affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX J

Complaint of ALLIED TOWING CORPORATION, as owner of the TANKBARGE ATC 3060, for exoneration from or limitation of liability.

Civ. A. No. 75-151-N

United States District Court

E. D. Virginia

Norfolk Division

August 2, 1976.

Shipowner filed a complaint for exoneration from or limitation of liability arising from a barge explosion. The District Court, Clarke, J., held that the owner's employees, who were engaged in repairing the vessel at the time of the explosion, could assert a cause of action against the owner on the basis of its alleged negligence in permitting the barge to transport a grade of fuel that it was not certified

to carry pursuant to coast guard regulations.

Motion for summary judgment denied.

Morton H. Clarke (Vandeventer, Black, Meredith & Martin), Norfolk, Va., for plaintiff.

Sidney H. Kelsey, Arthur C. Ermlich, Ralph Rabinowitz, Alan P. Owens, Gerard P. Rowe, R. Arthur Jett, Jr., C. Arthur Rutter, Jr., Kanter & Canter, Seawell, McCoy, Dalton, Hughes, Gore & Timms, Norfolk, Va., for claimants.

MEMORANDUM OPINION AND ORDER

CLARKE, District Judge.

The Court has held previously that Allied Towing Corporation [hereinafter

referred to as "Allied"] is not entitled to exoneration from or limitation of liability as to the claims arising from the explosion in or on one of its barges during repairs to the barge being made by Allied's employees. Complaint of Allied Towing Corporation, 409 F.Supp. 180 (E.D.Va.1976). Allied now moves the Court to enter summary judgment in its favor in the pending claims asserted by its employees and the personal representatives of deceased employees who were injured or killed in the barge explosion.

Allied argues that the Amendments of 1972 to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. [LHWCA] specifically bar an action by a longshoreman against his employer when the employee is engaged in ship repair services.

Section 905(b) of the LHWCA now provides:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons

engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

It is undisputed that Allied and its injured employees fall within the definitional provisions of the Act. 33

U.S.C. §902(3) and (4). The sole issue is whether the employees have a cause of action against the vessel for negligence.[1] The Amendments, which seek to limit the claims against their employers by maritime oriented employees, other than seamen, to recovery under the Act, fail to consider the problem when the employer, who is paying for workmen's compensation, is also the owner of the vessel. The Third Circuit Court of Appeals discussed this problem at length in Griffith v. Wheeling Pittsburgh Steel Corporation, 521 F.2d 31 (1975), cert. denied, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976). After reviewing the legislative

---

[1] The 1972 Amendments eliminated the injured longshoremen's seaworthiness cause of action against the vessel. 33 U.S.C. §905(b). See G. Gilmore & C. Black, The Law of Admiralty, § 6-46 to 57 (2d ed. 1975).

history and relevant historical precedents, the Court concluded:

> "The vessel, even a vessel which is an employer under the act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence." Griffith, supra at 43.

[1] The holding in Griffith is addressed to stevedoring services but is applicable equally to employees in repair services because the language of Section 905(b) is the same as to both categories of employees. Under the logic of the Griffith decision, the Court believes that Allied employees have a cause of action in negligence against their employer in its capacity

as owner of the ATC 3060. The Court reaches this result with extreme reluctance. Logic clearly compels a different outcome. The entire thrust of the 1972 Amendments was to strengthen the compensation system for longshoremen. The instant decision permitting longshoremen a cause of action against their employer flies in the face of the statutory compensation system. The conclusion, however, is militated by the draftsmanship of the 1972 Amendments.

Allied asserts that even if the decision in Griffith is followed that its employees' cause of action is barred by the repair services proviso in Section 905(b). That section proscribes a cause of action "if the injury was caused by the negligence of persons engaged in providing ship building or

repair services to the vessel." 33 U.S.C. §905(b). On its face, the statute establishes a two-fold test to qualify for this exclusion. First, the injured employee must have been employed for the purpose of repair services. Second, the negligence must have been that of employees engaged in providing repair services. Without consideration of whether the record as it now stands would substantiate that those claimants sought to be denied were repairmen, the Court will consider the second requisite, that is, were the employees who caused the explosion employed for the purpose of repair services.

In its opinion denying limitation of liability, the Court held that the causes of the explosion of the ATC 3060 were within the privity and knowledge of the supervising personnel of Allied.

Specifically, the Court concluded that Allied: (1) should have procured a gas free certificate prior to commencing repair; (2) should have provided for a systematic method to secure gas free certifications or to assure the gas freeing of a vessel before hot work was commenced; and (3) should not have permitted the ATC 3060 to transport a grade of fuel that it was not certified to carry pursuant to Coast Guard regulations.

[2] For the employees to have a cause of action, it must be established that ship occasioned negligence occurred and was a cause of the injury. The Court believes that the first two causes fall within the ambit of repair services as the term is employed in Section 905(b) and, therefore, meet the exclusion. The Court must focus on the

third cause and ascertain whether this occurred as a result of "owner" occasioned negligence and was not excluded as a ship repair function. Research has not produced any authorities delineating the scope of owner occasioned negligence. In light of the compensation system available to employees, the breadth of liability should be extremely narrow. In the instant case, the ATC 3060 in and of itself was not negligent or unseaworthy[2] before taking on the cargo. However, when Grade C Crude oil cargo was lightered to the ATC 3060, which was certified to carry only Grade

---

[2]The Court is mindful that Section 905(b) eliminated the duty of seaworthiness. Nevertheless, from a practical perspective, negligence as employed in Section 905(b), frequently does not differ in its essence from seaworthiness. See G. Gilmore & C. Black, The Law of Admiralty, 452-453 (2d ed. 1975).

D oil, the ship fell from its status of nonculpability. Decisional precedents establish that a vessel is responsible for cargo which causes harm or creates an unseaworthy condition.[3] Gutierrez v. Waterman Steamship Corp., 373 U.S. 306, 213, 81 S.Ct. 1185, 10 L.Ed.2d 297 (1962).[4] The Supreme Court also stated in Gutierrez that "[t]here is no distinction in admiralty between torts committed by the ship itself and the ship's personnel while operating it. .

---

[3]The Court reiterates that the discussion relative to seaworthiness is important only in that it is frequently interchanged with negligence and often both are derived from the same source.

[4]The Supreme Court's decision in Victory Carriers, Inc. v. Law, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383, rehearing denied 404 U.S. 1064, 92 S.Ct 731, 30 L.Ed.2d 753 (1971) does not alter the Court's reliance on Gutierrez. The Victory Carriers decision merely delineated the extent of federal maritime jurisdiction for land based injuries.

.." Id. at 210, 83 S.Ct. at 1188. Under this standard, it appears that Allied in its capacity as shipowner is liable for creating a negligent condition which was a cause of the explosion. Allied's negligence does not have to be the sole proximate cause to impute liability. Spinks v. Chevron Oil Company, 509 F.2d 216 (5th Cir. 1975).[5] See generally Shellman v. United States Lines, Inc., 528 F.2d 675 (9th Cir. 1975); Dodge v. Mitsui, 528 F.2d 669 (9th Cir. 1975); Edmunds v. Compagnie, No. 74-339-N (E.D.Va 1976).

[3] The Court's findings of fact and conclusions of law are res judicata

---

[5]The Court is cognizant that this is a Jones Act case but believes that the concept is also applicable in the instant circumstances. See G. Gilmore & C. Black, The Law of Admiralty, 452-452 (2d ed. 1975). See contra Comment, Negligence Standards under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints, 21 Villanova L.Rev. 244 (1975).

or collateral estoppel in any subsequent proceedings. The Matter of Double D. Dredging Company, Inc.,[6] 467 F.2d 468 (5th Cir. 1972); cf. Guillot v. Cenac Towing Co., 366 F.2d 898, 909 (5th Cir. 1966); Pershing Auto Rentals, Inc. v. Gaffney, 279 F.2d 546 (5th Cir. 1960). In Double D Dredging Company, the Court would not permit a shipowner to admit that the accident occurred in navigable waters and decedent was a seaman-crew member within the meaning of the Jones Act in the limitation proceedings and in a subsequent jury trial deny both admissions. The Fifth Circuit opined

---

[6]This decision has not been cited by any other court and has been questioned by a leading treatise. G. Gilmore & C. Black, The Law of Admiralty, § 10-19, 872-873. One of the problems posed by the treatise appears here. The limitation proceedings and the employees' suits have not been consolidated. The failure to consolidate does not alter the result.

that "it is unimportant whether this [shipowner being estopped] is because of the prior specific pleadings or the holding of navigability implicit in the Court's denial of limitations on the merits rather than on the absence of admiralty jurisdiction." The Matter of Double D Dredging Company, supra at 469 [footnotes omitted]. Clearly, the loading of impermissible cargo was not a ship repair function and, therefore, is not excluded under §905(b).

The Court, therefore, finds the vessel guilty of non-excluded owner occasioned negligence and DENIES the Motion for Summary Judgment.

Finally, the Court dissolves the restraining Order entered April 10, 1975, thus permitting claimants to proceed with the actions and repair to the forum of their choice. See Fecht v.

Makowski, 406 F.2d 721, 722 (5th Cir. 1969). See also Narragansett Fishing Corp. v. F/V Bob n Barry, 425 F2d 733, 734 (1st Cir. 1970).

APPENDIX K

Complaint of ALLIED TOWING CORPORATION, as Owner of the TANKBARGE ATC 3060 for exoneration from or limitation of liability.

Civ. A. No. 75-151-N

United States District Court

E. D. Virginia

Norfolk Division.

February 5, 1976.

As Amended March 9, 1976.

The owner of a tank barge sought exoneration from or limitation of liability in regard to damage caused by an explosion and subsequent fire aboard the barge. The District Court, Clarke, J., held that where it was established that actions and inactions of the barge owner were the proximate cause of the explosion and fire, the barge owner was not entitled to exoneration. Failure of the vice-president of maintenance of the

corporate barge owner to undertake precautions which should have been taken as matter of course to avoid the explosion on the tank barge imputed negligence to supervisory personnel of the corporate owner, and, in view also of evidence of failure of other officers to perform duties in an appropriate manner, the owner was not entitled to limitation of liability.

Petition denied.

Morton H. Clark, of Vandeventer, Black, Meredith & Martin, Norfolk, Va., for plaintiff.

Sidney H. Kelsey, Arthur C. Ermlich, Ralph Rabinowitz, Alan P. Owens, Gerard P. Rowe, R. Arthur Jett, Jr., C. Arthur Rutter, Jr., Kanter & Kanter, Seawell, McCoy, Dalton, Hughes, Gore & Timms, Norfolk, Va. for claimants.

MEMORANDUM OPINION AND ORDER

CLARKE, District Judge.

Allied Towing Corporation [hereinafter referred to as "Allied"] seeks exoneration from or limitation of liability in regard to damages caused by an explosion and subsequent fire aboard the tank barge ATC 3060 on March 17, 1975. Exoneration from or limitation of liability is sought pursuant to 46 U.S.C. §181, et seq. Allied is entitled to exoneration if it is free of liability. If negligence is established, Allied argues that damages for which it would be liable should be limited to the barge's value and its pending cargo pursuant to the

statute.[1] Jurisdiction is invoked pursuant to the Court's general admiralty jurisdiction, 28 U.S.C. §1333 and the specific grant of jurisdiction to supervise limitation of liability proceedings.

Allied has complied with the statutory requirements detailed in 46 U.S.C. §181, et seq. and the provisions of Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims,

---

[1] 46 U.S.C. § 183(a) provides:
The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Federal Rules of Civil Procedure. Allied fulfilled the notice requirements informing all potential claimants that Allied was seeking exoneration from or limitation of liability. The parties opposing Allied's invocation of limitation of liability are persons whose property or person were injured by the explosion and fire aboard ATC 3060. Parties were provided an opportunity to present evidence and brief the relevant issues.

FINDINGS OF FACT

Most of the facts are not in dispute. Allied Towing Corporation is a wholly owned subsidiary of Allied Marine Industries, Inc.[2] William E. Law is

---

[2]Allied Marine Industries, Inc. also wholly owns Allied Container Service, Inc., Chemphalt of Carolina, Inc., and Sea Port Supply Corporation. None of these subsidiaries are involved in the proceedings in the instant case.

president of both Allied Marine Industries, Inc. and Allied Towing Corporation. Similarly, he is a director and stockholder of both corporations. Allied's corporate headquarters are located at Norfolk, Virginia, as is its principal place of business. Both are located in close proximity to the banks of the Eastern Branch of the Elizabeth River on Avory Avenue, in Norfolk, Virginia.

Allied is the owner of the barge ATC 3060 which was moored at the corporation's docks on March 17, 1975. ATC 3060 is designed to carry fuel oils and is an unmanned barge built in 1968 and had been owned by Allied since 1972. ATC 3060 was docked for the purposes of investigating for and if necessary, repairing a suspected leak in one of its tanks. The history of the leak is

pertinent to this limitation proceeding.

On March 15, 1975, an Allied tug towing ATC 3060 was directed by Joe Smith, Vice President of Operations, to meet the tanker AMOCO Yorktown and to lighten a cargo of Grade C crude oil from the ship to a dock on the York River. Chemical tests by Amoco confirmed that the AMOCO Yorktown was carrying Grade C and that the oil delivered was Grade C. This cargo was discharged from the barge at the AMOCO Yorktown refinery on Sunday, March 16, 1975. In the process of discharging, an oil slick formed near the ATC 3060 and it was suspected that it was caused by a leak in one of the barge's fuel compartments. The tankerman in charge of the barge contacted Mr. Wayne Johnson, Allied's Vice President of Maintenance and Repairs, on Sunday,

March 16, 1975. Mr. Johnson was advised that the ATC 3060 had a suspected leak and the barge was ordered to return to Allied's yards for inspection and if necessary, for repairs. It is not disputed that both Wayne Johnson, Vice President, and Benny Harwood, General Foreman, were cognizant on March 16, 1975, that ATC 3060 had a suspected leak and was en route to the corporation's Norfolk docks for inspection and possible repair on Monday, March 17, 1975.

ATC 3060 was within the parameters of Allied's property at the commencement of the workday on March 17, 1975. ATC 3060 was initially in the fleet area but it was moved to a position next to the dock during the morning. At approximate 7:30 A.M., Johnson directed Richard T. Waida, an employee of Allied holding the

position of Assistant Port Engineer, to examine the barge for the suspected leak. Additionally, Powell, Allied's Yard Superintendent, requested labor pusher Turner to inspect the tanks of the ATC 3060 to see whether water was in the tanks. Turner reported that there was not any water in the tanks. Nevertheless, Powell personally inspected the tanks for the presence of water and then directed Benny Harwood, General Foreman, to have one of the barge's tanks air tested for a leak. At this time, Powell was aware that Waida had been assigned to inspect the barge for a leak.

ATC 3060 was air tested in an effort to discover the leak's source. This consisted of pumping air into the sealed fuel cargo hold, building up pressure inside the hold and painting

the outside of the barge in the areas of suspected leak with soap. As the air escaped at the point of the leak, the soap bubbles thus disclosing the leak. Although Waida was in charge of the ATC 3060 repair, he testified that he did not direct the air tests to be performed nor was he aware who did order the tests. In contrast to Waida's testimony, Johnson testified that on two separate occasions he discussed the repair with Waida and inquired about the status of the leak. According to Johnson, Waida indicated that an air test was going to be performed and that the specific trouble had been located and the Coast Guard had been notified. The Court finds as a fact that Johnson asked specifically on two separate occasions about the repair of ATC 3060 on the day of the explosion and that he

queried Waida whether the Coast Guard had been notified.[3] The Court concludes that although Assistant Port Engineer Waida had been assigned to the repair job, a clear line of responsibility and accountability had not been formulated as evidenced by the variety of employees involved in the repair and the failure of one employee to direct and supervise the repair.

The Court also finds as a fact that at the time of the explosion, Waida was aware that employees of Allied were doing hot work (welding) on the barge. This work was being done in the same location where Waida had observed Allied

---

[3]The Coast Guard regulations require all ships to report leaks causing discharges to rivers or seas. Allied reported that the source of the leak had been located and was in the process of being repaired. The Coast Guard also received a pollution report from Allied regarding the oil discharge into the York River at the AMOCO Yorktown refinery.

employees performing a soap test to find the leak's source. At the time of the explosion, WAida and Executive Vice President for Special Projects Ferrer were standing at the back of the barge measuring its stern for a purpose not connected with the leak repair.

The evidence adduced shows that Yard Superintendent Powell was aware that a fire watch, that is, additional personnel to stand by with fire fighting equipment, was requested for ATC 3060. This request was made by Benny Harwood, General Foreman. Overhearing the request for a fire watch, Powell suggested that a fire hose should be used in addition to the fire extinguisher. Powell testified that he assumed that if Harwood was requesting a fire watch that hot work (welding) was anticipated. The Court finds

specifically that Powell, the yard superintendent, was cognizant that the ATC 3060's leak was going to be repaired by means of welding. The Court also concludes that Powell presumed that a gas free certificate for the ATC 3060 had been acquired although he did not make any inquiries into whether said certificate had been, in fact, secured. The Court also finds that Powell had not visibly seen whether there was a gas free certificate for ATC 3060. The evidence establishes that the barge was visible from the offices of the operations department of Allied.

GAS CERTIFICATE REQUIREMENT

46 C.F.R. 35.01-1 (1975) provides in pertinent part:

"(a) The provisions of 'Standard for the Control of Gas

Hazards on Vessels to be Repaired,' NFPA No. 306, published by Nation Fire Protection Association, 60 Batterymarch Street, Boston, Mass. 02110, shall be used as a guide in conducting the inspections and issuance of certificates required by this section.

"(b) Until an inspection has been made to determine that such operation can be undertaken with safety, no alterations, repairs, or other such operations involving riveting, welding, burning, or like fire-producing actions shall be made:

"(1) Within or on the boundaries of cargo tanks which have been used to carry flammable or combustible liquid or chemicals

in bulk, or within spaces adjacent to such cargo tanks; or

"(2) Within or on the boundaries of fuel tanks; or,

"(3) To pipe lines, heating coils, pumps, fittings, or other appurtenances connected to such cargo or fuel tanks.

"(c) Such inspections shall be made and evidenced as follows:

"(1) In ports or places in the United States or its territories and possessions, the inspection shall be made by a marine chemist certificated by the National Fire Protection Association. . .If the inspection indicates that such operations can be undertaken with safety, a certificate setting forth the fact in writing and qualified as may be required, shall be issued

by the certified marine chemist or the authorized person before the work is started. Such qualifications shall include any requirements as may be deemed necessary to maintain, insofar as can be reasonably be done, the safe conditions in the spaces certified throughout the operation and shall include such additional tests and certifications as considered required. Such qualifications and requirements shall include precautions necessary to eliminate or minimize hazards that may be present from protective coatings or residues from cargoes. . .

"(d) It shall be the responsibility of the senior officer present to secure copies of certificates issued by the certified marine chemist or such

person authorized by the Officer in Charge, Marine Inspection. It shall be the responsibility of the senior officer present, insofar as the persons under his control are concerned, to maintain a safe condition on the vessel by full observance of all qualifications and requirements listed by the marine chemist in the certificate.

The evidence is not uncontroverted that ATC 3060 did not have a gas free certificate as required by the federal regulations and the Court so finds.[4]

---

[4]The provisions of "Control of Gas Hazards on Vessels to be Repaired," NFPA No. 306, published by Nation Fire Protection Association, delineate with greater specificity the precautions that should be undertaken when hot work is conducted on tank barges. These provisions set forth the definitions of hot work, tank barge and other relevant terms. Since these terms are not contested and it is undisputed that a gas free certificate was not obtained, it is unnecessary to discuss the requirements of these provisions.

Employees of Allied testified that it was the usual practice to obtain a certificate before any welding was done. The normal practice was for Erick Kaiser, Allied's safety directory, to inspect the barge, test the atmospheric conditions and determine whether the barge was gas freed. It was Kaiser's job to conclude whether the atmosphere was "safe for men" to perform repair functions. Kaiser would also determine whether a gas free certificate was necessary.

Kaiser was the sole Allied employee designated as a "competent person" under the Occupational Safety and Health Act regulations. The designation was made on February 10, 1975, by the Bureau of Labor Standards of the United States Department of Labor. The parameters of Kaiser's designation were "to ascertain

that the atmospheres remain gas free and contain sufficient oxygen after certification by a N.F.P.A. certified marine chemist. Also, to conduct initial survey in vessels for oxygen and combustible atmospheres prior to entry of employees." Trial Exhibit 17. This form is signed by both Kaiser and Joseph W. Carriker, Executive Vice President of Allied. The evidence is uncontroverted that Kaiser did not test the atmosphere of the ATC 3060 on March 17, 1975. Kaiser was not contacted to inspect ATC 3060 nor did he undertake any efforts to have a marine chemist certify the barge as gas freed. The Court finds that Allied violated the OSHA regulations requiring a "competent person" to test the atmosphere of ATC 3060 prior to the entry of an employee into one of the tanks.

After inspecting and testing the atmosphere and concluding that it was free of gas, Kaiser or one of the employees would normally contact a local marine chemist who would test to determine whether the barge was gas freed. If the barge was gas freed, the chemist would issue a certificate attesting to said condition. Richard Waida testified that it would usually take one day to gas free a barge such as the ATC 3060. The marine chemist who issued certificates was generally available to Allied at two or three hours' notice. The evidence shows that at least four employees were authorized to contact the chemist to obtain a gas free certificate. Furthermore, the evidence shows that none of these individuals secured a gas free certificate.

The evidence is uncontradicted that Allied did not have any systematic procedure or method for contacting the marine chemist. Any number of employees had the authority to contact the chemist and, in fact, did contact the chemist. It appears that whichever employee was doing the repairs would obtain the certificate. The evidence supports the finding that Allied management personnel was aware that there was no chain of command for obtaining a chemist's gas free certificate.

When issued, several copies of the certificate are available at the repair site. According to Yard Superintendent Powell, the typical certificate repositories were that one copy was posted at the location of the repair, one was delivered to Safety Director Kaiser, and one to the shop foreman.

Wayne Johnson testified that although he did not know the specific nature of ATC 3060's cargo, he presumed that the barge would be gaseous because it had carried crude oil. Johnson was aware that federal regulations required a chemist's certificate that the barge was gas free prior to starting any hot work. The Court finds that Johnson, Vice President of Maintenance, had knowledge of the general nature of the cargo and that, imbued with this knowledge, was aware that the barge would have to be gas freed and certified as such prior to commencing any welding.

The Court finds that the cause of the ATC 3060 explosion was that the barge was not gas freed when welding was being performed on the barge. The Court further finds that the explosion would not have occurred had the federal

regulations been complied with and the barge gas freed. The Court also finds that none of the Allied Supervisory staff undertook any efforts to determine whether a chemist's certificate of gas free condition had been obtained. The Court concludes that Allied supervisory staff knew that the typical method of repairing a leak in a tank barge was by means of hot work. Furthermore, Allied supervisory staff knew that prior to any welding, a marine chemist must issue a gas free certificate for the area where the welding will occur. Nevertheless, Allied supervisory employees did not act in a manner commensurate with their knowledge to prevent the explosion.

Allied promulgated Safety Rules and Regulations on January 27, 1975. These regulations incorporate the federal regulations governing hot work. The

regulations also detail the OSHA regulation that employees should not enter tanks or compartments until "it has been ascertained by a competent person that the compartment, tank or rake is 'safe for men'. The Court finds that neither of these company regulations were followed by Allied employees on March 17, 1975. Yard Superintendent Powell testified that he was not aware of Allied's Safety Rules and Regulations until after the March 17, 1975 explosion. The accident occurred almost two (2) months after the effective date of the internal safety rules. Considering Powell's ignorance of the safety regulations, the Court also finds that Allied did not adequately inform and educate its employees regarding the requisites of the safety regulations.

Violation of Coast Guard Regulation

A second statutory violation occurred involving the ATC 3060. The barge was originally certified by the Coast Guard to Carry all grades of fuels and oils. Coast Guard regulations provided that ATC 3060 was scheduled to be drydocked and examined internally in November of 1974. In September, 1974, Allied requested that the Coast Guard extend the regulation's application for one year. On November 15, 1974, the Coast Guard issued a Certificate of Inspection for ATC 3060 permitting the barge to continue operating without drydocking and internal examination until November 1975. The certificate unequivocally provides that the barge was inspected by the Coast Guard and Approved solely for the carriage of

Grade "D" oil. This document is unambiguous.

Allied does not deny receiving the document. William Bruce Law, Administrative Assistant to the Maintenance Vice President and sone of the President of Allied, received the downgrading certificate from the Coast Guard. Law testified that both Wayne Johnson, Vice President of Maintenance, and Charles Ferrer, Allied Vice President of Special Projects, were aware of the downgrading of the tug to Grade D from all grades. Additionally, Allied has stipulated that Vice President of Special projects Charles Ferrer was present as the owner's representative when ATC 3060 was downgraded to Grade D oil. Mr. Ferrer did not testify. Bruce Law testified

that the Operations Department would be notified "as a matter of course."

Joseph Smith, Vice President of Operations, arranged for the ATC 3060 to meet the AMOCO Yorktown on March 15, 1975, and lighter 35,000 gallons of black oil. Smith had direct contact with the Amoco's Chicago office which arranged for the transporting of the oil to the Yorktown refinery. Smith testified that Amoco did not specifically inform him of the grade of the oil. However, Smith stated that the specific grade was not of major importance to him because Allied had three (3) barges with identical equipment and were certified at the same level. Smith believed that ATC 3060, 3061 and 3062 were certified to carry the type of oil Amoco desired to be transported. All barges were within the

general vicinity of the AMOCO Yorktown. Smith testified that the first time he learned the general nature of the cargo was on Saturday, March 15, 1975. At that time, he was not advised of the crude oil's grade. Smith testified that he did not know that ATC 3060 had been downgraded by the Coast Guard and only authorized to carry Grade D crude oil. ATC 3060 was selected to transport the Amoco oil because, on March 14, 1975, the barge was in the closest proximity to the AMOCO Yorktown. Smith testified that the grades of oil have various flash points. 46 Code of Federal Regulations, Sections 30.10 and 30.-10-22, respectively, defined Grade D as a combustible liquid having a flash point below 150° F. and above 80° F. and Grade C as a flammable liquid having a flash point of 80° F. or below.

Chemical tests of the cargo actually carried on the ATC 3060 established its flash point at 68° F. The evidence supports the conclusion that grades of oil may not be ascertained by a mere visible inspection.

The grades appear virtually identical. It is conceded that a tankerman does not have the skill to determine the grade. Therefore, the tankerman of the ATC 3060 would not be expected to know the grade of the oil. Chemical analysis must be employed to determine the grade. It is undisputed that the AMOCO Yorktown was carrying light Iranian Grade C oil and that there was a substantial difference between flash points of the actual cargo and Grade D crude oils.

Smith testified that crude oil would generally be graded as either

Grade C or D. Although ATC 3060 was downgraded in November, 1976 and the explosion occurred in March of 1975, Smith stated that he was not aware of the downgrading of the barge until after the accident. It is smith's belief that the personnel of the maintenance department, specifically Wayne Johnson or Bruce Law, should have notified him of the downgrading of ATC 3060. At the trial, Smith stated that if he had known that the barge was only certified for Grade D, he would not have assigned the ATC 3060 to transport the Amoco oil.

William Law, President of Allied, testified that he was not aware of the downgrading of ATC 3060. Law testified that he did not know that the ATC 3060 was transporting a grade of oil that it was not authorized to carry. Law testified that he did not learn of the

nature of the cargo until after the March 17, 1975, explosion. Allied's President, however, testified that employees, particularly the operations department, should have known the grade of oil to be transported in order to properly match the vessel to the cargo. It was Law's opinion that the tankerman transporting the oil should know the grade of the cargo. The testimony seems to support the conclusion that the barge's tankerman did not know the grade of the cargo. The testimony seems to support the conclusion that the barge's tankerman did not know the grade. Law confessed that "I was dumbfounded that it blew up. . ."

Robert Wade, a superintendent at the AMOCO Yorktown refinery, testified that it would be customary of the Chicago headquarters to inform the

transporting company of the cargo's grade. In the instant transaction, Smith testified that he did not ask nor was he informed of the specific grade of the cargo. Johnson testified that he did not know the specific grade of the cargo except for the general knowledge that it was crude oil. However, Johnson testified that Vice President of Operations Smith should have known the contents of the cargo.

[1] The Court finds that although Smith did not know that ATC 3060 had been downgraded, he had an absolute duty as Vice President of Operations in charge of assigning vessels to convey cargoes to know the Coast Guard authorization or certification of each of this company's vessels under his control. Furthermore, he had immediate access to the Coast

Guard certificates giving this information. Allied officers were located in the same building which was adjacent to its docking facilities on the Eastern Branch of the Elizabeth River. During the time of the downgrading and to the date of the explosion, Bruce Law's office and Smith's office were in close proximity. It was common knowledge to Allied officers that Bruce Law's office was the repository of all Coast Guard certificates. The Court finds that Smith had adequate opportunity to discover that the ATC 3060 had been downgraded.

The Court also finds that Allied lacked any procedure to inform the employees that the barge had been downgraded. Allied's Executive Vice President for Special Projects was

cognizant of the downgrading and yet, the record does not show that he expended any efforts to notify affected personnel. Additionally, Vice President Smith was in a position to ascertain the grade of oil that the ATC 3060 lightered from the AMOCO Yorktown. The evidence substantiates that the Vice President of Maintenance had ample opportunity to learn that the barge had been downgraded, especially in light of the fact that his own administrative assistant was the overseer of all Coast Guard certificates.

The Court finds that the transporting of Grade C oil by the ATC 3060 in derogation of the Coast Guard certification contributed to the explosion aboard the ATC 3060 on March 17, 1975, as it was the residual of this cargo that exploded.

CONCLUSIONS OF LAW

[2,3] The evidence lucidly establishes that Allied was liable for the ATC 3060 explosion. The facts are overwhelming that the actions and inactions of Allied employees were the proximate cause of the explosion and subsequent fire aboard the ATC 3060. Allied is not entitled to exoneration from liability. Therefore, the fundamental question before the Court is whether Allied may receive the benefits of a limitation of liability.

[4,5] The party seeking exoneration from or limitation of liability has the burden of proof. Coryell v. Phipps, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943). In light of Allied's corporate ownership, its burden is to establish that the negligence heretofore found was not that

"of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred." Coryell v. Phipps, 317 U.S. 406, 410, 63 S.Ct. 291, 293, 87 L.Ed. 363 (1943) citing Spencer Kellogg & Sons v. Hicks, 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903 (1932). Allied must show that its management personnel did not have "privity or knowledge" of the causes of the explosion aboard the ATC 3060.

Privity or Knowledge

Limitation of liability is available to the shipowner if the causes of the accident were not within the privity and knowledge of "managing officers" or "supervisory employees." Other courts have held that "[t]he title or rank of these employees is, by

itself, of limited value in determining on which side of the line a particular case falls." United States v. Standard Oil Company of California, 495 F.2d 911, 917, (9th Cir. 1974). The truest measure whether employees are "managing officers" is "not as to their being officers in a strict sense but as to the largeness of their authority." United States, supra, at 917, citing Waterman Steamship Corporation v. Gay Cottons, 414 F.2d 724, 731 (9th Cir. 1969), citing In re P. Sanford Ross, 204 F. 248, 251 (2d Cir. 1913). The Court is charged with examining which Allied employees have general powers over the entirety or a segment of the business in order to bind the corporation. Allied does not suggest that William Law, President, or the Vice Presidents Johnson, Smith or Ferrer are not

supervisory employees. Rather, Allied argues that these individuals were without privity or knowledge of the causes of the ATC 3060 explosion, thus entitling Allied to the benefits of limitation of liability.

[6] The "knowledge" of supervisory employees is not limited to what they in fact know. The Cleveco, 154 F.2d 605 (6th Cir. 1946) is the seminal case defining the type of knowledge required. In that case, the Sixth Circuit held that:

> "knowledge means not only personal cognizance but also the means of knowledge--of which the owner or his superintendent is bound to avail himself--of contemplated loss or condition likely to produce or contribute to loss, unless appropriate

means are adopted to prevent it." The Cleveco, supra at 613.

The Cleveco definition of knowledge has been cited with approval by numerous courts. See e.g. Avera v. Florida Towing Corporation, 322 F.2d 155 (5th Cir. 1963); Daniels v. Trawler Sea Rambler, 294 F.Supp. 228 (E.D.Va. 1968).

Supervisory employees may not rest lackadaisically upon their personal knowledge but are charged with a duty to reasonably inspect and supervise their operations. Great Atlantic & Pacific Tea Co. v. Brasileiro, 159 F.2d 661, 665 (2d Cir. 1947).

[7] The level of knowledge charged to supervisory employees varies relative to the ability of the supervisors to exercise control. Summarizing the law

in limitation proceedings, the Ninth Circuit concluded that:

> "The great majority of the cases denying limitation of liability have involved old barges, tugs, and other vessels obviously more capable of control by the home office than a freighter thousands of miles away. And most of these cases involved either a long-standing practice of failing adequately to inspect the vessel, or otherwise to exercise control over activities in the home port." Waterman Steamship Corporation v. Gay Cottons, 414 F.2d 724, 733, (9th Cir. 1969).

[8,9] The record shows that all activities transpired at Allied's Norfolk, Virginia, facility. The

corporate headquarters are located on the same premises where the ATC 3060 explosion occurred. All key supervisory personnel worked at this location and were cognizant that the ATC 3060 had a suspected leak and was scheduled to be repaired on March 17, 1975. In light of the proximity of Allied's headquarters to the location of the ATC 3060, Allied's duty to supervise and prevent hazardous conditions is elevated. Sylve v. E.W. Gravolet Canning Company, 278 F.Supp. 669, 673 (E.D.La. 1967). The Court concludes that the Vice President of Maintenance Wayne Johnson vitiated his duty to inspect the progress of the repairs of the ATC 3060. The Court opines that had Johnson fulfilled his duties and conducted an inspection of the ATC 3060 repair effort, the explosion would not have occurred. See,

e. g. Waterman Steamship Corporation v. Gay Cottons, 414 F.2d 724, 732 (9th Cir. 1969). Johnson's inspection would have discovered that the safety regulations had not been complied with. Johnson testified that he assumed that the ATC to be gaseous. The Court finds that in light of this assumption, Johnson should have ordered as a matter of course a gas free certificate. His failure to undertake such precautions imputes negligence to Allied's supervisory personnel.

The Court also believes that Allied's failure to adopt any systematic method to secure the gas free certifications by a marine chemist mandated by federal regulations constitutes negligence on the part of Allied's supervisory employees. The haphazard approach to regulatory

compliance was a cause of the explosion. The evidence supports the conclusion that these employees knew or should have known that absent such procedures, an accident similar to the March 17, 1975, explosion would occur. This knowledge is also imputed to Allied's supervisory personnel solidifying the conclusion that Allied is not entitled to limitation of liability.

The Court further finds that the Vice President of Operations Joseph Smith did not perform his duties in an appropriate manner. The evidence shows clearly that had Smith inquired as to the type of cargo the ATC 3060 was scheduled to carry and as to the certification of the ATC 3060, that the barge would not have transported a grade of oil that it was not certified for. ATC 3060 was downgraded in November of

1974. The explosion occurred in March of 1975. The Court concludes that reasonable investigation and inspection by Smith would have discovered the downgrading. Smith's failure to inspect contributed to a condition that was a cause of the explosion. In light of the substantial disparity of flash points between the crude oil carried (68° F.) and Grade D oil (80° F. to 150° F.) the Court concludes that ATC 3060's transporting of the more combustible "C" Grade was a cause of the explosion. Smith's negligence is attributable to Allied and serves as another reason to deny limitation of liability.

The Court is not compelled to decide whether the actions of Powell, Waida, or Harwood fall within the ambit of "managerial officer" or "supervisory employee." Although there appears to be

ample evidence to support such a finding, it is unnecessary to discuss these issues in light of the disposition.

It is the determination of this Court that the evidence on which its findings of fact have been based not only preponderates but is overwhelming. In view of this clear preponderance of the evidence against Allied, it is unnecessary for the Court to determine if the violation of the statutory duties heretofore referred to invoke the doctrine set forth in The Pennsylvania, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873). This doctrine referred to as the Pennsylvania Rule provides that where a statutory duty is violated the violating party has the burden of establishing that the violation could

not have caused the occurrence giving rise to the claim for damages.

Allied's petition for exoneration from or limitation of liability is Denied. Counsels for claimants are directed to present an appropriate Order to the Court within ten (10) days of the entry of this Opinion.

APPENDIX L

33 U.S.C. Sections 905 & 933
LONGSHOREMENS' AND HARBOR WORKERS' COMPENSATION ACT

Section 905(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in

admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be

void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Section 933(a) If an account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person

shall commence an action against such third person within six months after such award.

(c) The payment in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(3) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to ___

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so

computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the

amount recovered against such third person.

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

APPENDIX M

VIRGINIA DEATH BY WRONGFUL ACT STATUTE

§8.01-50. Action for death by wrongful act; how and when to be brought.--A. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship

or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

(B) Every such action under this section shall be brought by and in the name of the personal representative of such deceased person within the time limits specified in §8.01-244.

(C) If the deceased person was an infant who was in the custody of a parent pursuant to an order of court or written agreement with the other parent, administration shall be granted first to the parent having custody; however, that parent may waive his right to qualify in favor of any other person designated by

him. If no such parent or his designee applies for administration within thirty days from the death of the infant, administration shall be granted as in other cases. (Code 1950, §8-633; 1958, c.470; 1977, c.617; 1981, c.115.)

§8.01-52. Amount of damages.--The jury or the court, as the case may be, in any such action under §8.01-50 may award such damages as to it may seem fair and just. The verdict or judgment of the court trying the case without a jury shall include, but may not be limited to, damages for the following:

1. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;

2. Compensation for reasonably expected loss of (i) income of the

decedent and (ii) services, protection, care and assistance provided by the decedent;

(3) Expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death;

(4) Reasonable funeral expenses; and

(5) Punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others.

Damages recoverable under 3,4, and 5 above shall be specifically stated by the jury or the court, as the case may be. Damages recoverable under 3 and 4 above shall be apportioned among the creditors who render such services, as their respective interests may appear.

Competent expert testimony shall be admissible in proving damages recoverable under 2 above.

The court shall apportion the costs of the action as it shall deem property. (Code 1950, §8-636.1; 1974, c.444; 1977, cc.460, 617; 1982, c.441.)

§8.01-53. Class and beneficiaries; when determined.--A. The damages awarded pursuant to §8.01-52 shall be distributed as specified under §8.01-54 to (i) the surviving spouse, children of the deceased and children of any deceased child of the deceased, or (ii) if there be none such, then to the parents, bothers and sisters of the deceased, or (iii) if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the

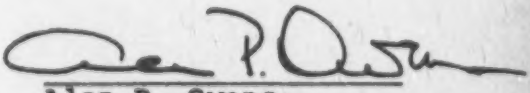
surviving spouse and such parent or parents. Provided, however, no parent whose parental rights and responsibilities have been terminated by a court of competent jurisdiction or pursuant to a permanent entrustment agreement with a child welfare agency shall be eligible as a beneficiary under this section.

B. The class and beneficiaries thereof eligible to receive such distribution shall be fixed (i) at the time the verdict is entered if the jury makes the specification, or (ii) at the time the judgment is rendered if the court specifies the distribution. (Code 1950, §§ 8.636.1,8-638; 1954, c.333; 1973, c.401; 1974, c.444; 1977, cc.460, 617; 1979, c.356.)

CERTIFICATE OF SERVICE

I hereby certify that on or before April 19, 1984, three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were mailed to S. Miles Dumville, Esquire, 310 South Boulevard, Post. Office Box 14515, Richmond, Virginia 23221, Counsel for Patricia Ann Brown; and three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were hand delivered to Wiley G. Gary, Esquire, 223 Monticello Arcade, Norfolk, Virginia 23514, Guardian ad Litem for Ronnie Edward Brown.

I further certify that all parties required to be served have been served.



Alan P. Owens
Counsel for
Petitioner